Farr Company *and* International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO. Cases 26–CA–12887 and 26–CA–13200

August 22, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND OVIATT

On October 11, 1990, Administrative Law Judge Richard J. Linton issued the attached decision. The General Counsel and the Respondent filed exceptions and supporting briefs, and they each filed answering briefs.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified.

The judge found, inter alia, that the Respondent violated Section 8(a)(1) of the Act when Supervisor Comer Reynolds threatened to call the police and have employee Bobby Kirby's vehicle towed if he again parked it on the access road leading into the Respondent's employee parking lot. At the time of the incident, Kirby was an open union supporter. The judge found that this warning violated Section 8(a)(1) because it was disparately severe when compared to the relatively mild warnings given to two other employees for improper parking. We disagree with the judge. We find that the preponderance of the evidence does not establish that Kirby was treated disparately because of his union activities. Accordingly, we shall dismiss this allegation.

Two other employees committed parking violations, but were given much milder warnings by the Respondent. However, one of these violations was much less serious than Kirby's, and we find the milder warning for that violation is reasonably explained on that basis. The other violation, quite similar to Kirby's, but for which a milder warning was issued was committed by another open and active union supporter, Smith. The judge found that Smith, unlike Kirby, was given a mild warning because he was related to Supervisor Reynolds. The judge inferred that open union supporter Smith was treated more leniently than Kirby on the basis of Reynolds' ''normal desire to maintain peace in the family.'' We find the judge's inference to be no more than speculation, without evidentiary support. Thus, we are left with similar parking violations committed by two open union supporters, only one of whom is given a severe warning. On these facts, we cannot find that the severity of Kirby's warning is based on his support for the Union.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Farr Company, Jonesboro, Arkansas, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(d) and reletter the subsequent paragraphs.

2. Substitute the attached notice for that of the administrative law judge.

[1] The General Counsel has filed a Motion to Strike Certain of Respondent's Exceptions and Argument Contained in Respondent's Exceptions on the grounds that they do not comply with Sec. 102.46(b)(1) of the Board's Rules and Regulations, which provides, in relevant part, that if a brief in support of exceptions is filed, the exceptions document shall not contain any argument or citation of authority in support of the exceptions, but such matters shall be set forth only in the brief. The General Counsel argues that (1) the Respondent's exceptions document does contain argumentation in support of some exceptions, and (2) the Respondent's brief in support of exceptions does not contain argumentation or citation of authority in support of some exceptions. Although the Respondent's exceptions do not conform in all respects with the pertinent sections of the Board's Rules and Regulations, they are not so deficient as to warrant striking them. Accordingly, the General Counsel's motion is denied.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In affirming the judge's finding that the Respondent unlawfully failed to promote employee Bobby Kirby to the position of painter, we rely, inter alia, on the judge's findings that (1) Personnel Manager Darrell Pickney told Kirby that he would be promoted if he had passed the painting test, and (2) that Kirby did in fact pass the painting test. Thus, we do not rely on the judge's factual finding, in sec. III,E,2,f,(2) of his decision, that Supervisor Reynolds told Pickney that Kirby had passed the test, and that Pickney then contacted an employment service.

We affirm the judge's dismissal of the allegation that Supervisor Keith Bowman unlawfully interrogated employee Bruce Carr in July 1988 (sec. III,D,2,a of the judge's attached decision). Member Cracraft finds it unnecessary to pass on this issue because the finding of an unlawful interrogation based on this allegation would only be cumulative to other unlawful interrogations found in this case, and would not affect the remedy.

We affirm the judge's finding that Kirby was provoked by the Respondent's unlawful interrogation and implied threat of discriminatory treatment into making the intemperate remarks for which Kirby was given an unlawful written warning for insubordination. In doing so, we do not rely on the judge's finding, in sec. III,E,2,f,(1) of his decision, that Pickney's admonition to Kirby to return to work and ''do a good job'' constituted a veiled threat that the Respondent would be looking for pretexts to warn Kirby as a prelude to discharging him because of his support for the Union.

Member Oviatt is not persuaded that, in Respondent's statement to Robert Elrod that ''they'' would not last 2 or 3 months if the Union came in, ''they'' referred to Respondent. Therefore, he does not join in finding the statement threatened plant closure.

No exceptions were filed to, inter alia, the judge's dismissal of the allegation that Bruce Carr was unlawfully denied promotion to leadman. We correct three inadvertent errors of the judge. First, in sec. III,E,1,e of his decision, the judge incorrectly states the date of Carr's discharge as October 16, 1988, rather than October 11. Second, in sec. III,E,1,e,(5), the judge listed Joe Carroll's disciplinary action as taking place on ''9–19–99'' rather than 9–19–88. Finally, the September 1, 1988 meeting referred to by the judge in sec. III,E,2,f,(1) of his decision was between Pickney and Kirby. These inadvertent errors do not affect the conclusions reached in this case.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO (the IUE), or any other union.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT threaten you that an employee was not promoted because of his or her union activities.

WE WILL NOT threaten you with punishment, specified or unspecified, if you wear union insignia.

WE WILL NOT threaten you that wearing IUE insignia suggests that you have an attitude problem.

WE WILL NOT threaten you that wearing IUE insignia suggests that you have an attitude problem and then imply that employees with such an attitude problem will not be promoted.

WE WILL NOT threaten to close the plant if the IUE (or any union) is elected as representative.

WE WILL NOT maintain any rule which requires employees to request management authorization to engage in lawful solicitation during nonworking time, and WE WILL NOT retain such a rule in an employee handbook even if the rule, as it there appears, is no longer in effect.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL notify you in writing, by memorandum or letter separate from this notice, that the no-solicitation rule, rule 41, appearing at page 20 of the April 1986 employee handbook, has not been in effect as written since it was amended September 8, 1987.

WE WILL supply all of you with inserts for the April 1986 employee handbook which (1) advises you that rule 41 at page 20 was amended on September 8, 1987, (2) provides the language of a lawful rule, or (3) substitutes a valid rule for rule 41, or WE WILL publish and distribute revised handbooks which do not contain an invalid no-solicitation rule.

WE WILL revise our records to show Bruce E. Carr promoted to the position of ''A'' class welder effective June 27, 1988, and WE WILL make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him.

WE WILL revise our records to show Bobby R. Kirby promoted to the position of painter effective September 1, 1988, and WE WILL offer Bobby R. Kirby immediate and full reinstatement to the position of painter or, if that job no longer exists, to a substantially equivalent position, without prejudice to seniority or any other rights or privileges previously enjoyed, and WE WILL make whole Bobby R. Kirby for any loss of earnings and other benefits from the discrimination resulting against him, less any net interim earnings, plus interest.

WE WILL remove from our files any reference to our unlawful (1) failure to promote Bruce E. Carr effective June 27, 1988, (2) August 31, 1988 first written warning to Bobby R. Kirby, and (3) failure to promote Bobby R. Kirby effective September 1, 1988, and WE WILL notify each of them that this has been done and that the unlawful actions will not be used against him in any way.

FARR COMPANY

Bruce E. Buchanan, Esq., for the General Counsel.
Oscar E. Davis Jr., Esq. and *James W. Moore, Esq. (Friday, Eldredge & Clark)*, of Little Rock, Arkansas, for the Respondent.
Ronnie E. Crider, I. Rep., Jerry W. Smith, I. Rep., and *George Clark, Sec.-Treas. Dist. II* (Electronic Workers IUE), of Forrest City, Arkansas, for the Charging Union.

DECISION

STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge. Ringing in my ear, the prophet's words I hear: ''Observe what is right. Do what is just.'' Is. 56:1. In this failure to promote and discharge case (Bruce E. Carr and Bobby R. Kirby), the difficulty is discerning who is right. I order promotion, reinstatement, and backpay respecting Kirby. Although dismissing the allegation that Respondent Farr unlawfully discharged Carr, I find that Farr illegally denied Carr promotion to ''A'' class welder. Hence, the practical remedy as to Bruce Carr is about 3.5 months of backpay for the pay differential.

I presided at the hearing of this case in Jonesboro, Arkansas, on 12 days beginning March 20, 1989, and closing on December 19, 1989. We began pursuant to the March 7, 1989 order consolidating cases, consolidated complaint, and notice of hearing issued by the General Counsel of the National Labor Relations Board through the Regional Director for Region 26 of the Board. The March 7 consolidated complaint is based on a charge filed by the International Union

of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO (the Union or IUE) and served October 28, 1988, on Respondent Farr Company (Respondent or Farr) in Case 26–CA–12887, and on a charge filed by the IUE and served March 2, 1989, on Farr in Case 26–CA–13064. On May 4, 1989, during the lengthy adjournment, the General Counsel moved to delete Case 26–CA–13064, and by order dated June 2, 1989, I granted that motion.

On June 27, 1989, the Regional Director for NLRB Region 26 issued a complaint in Case 26–CA–13200 based on a charge filed by the IUE on May 17, 1989, and served the same date. On August 11, 1989, the General Counsel moved to consolidate Case 26–CA–13200 (plus Case 26–RC–7135) with Case 26–CA–12887 and for resumption of the hearing. Farr not opposing the motion, by order dated September 1, 1989, I granted it. Before the November 28, 1989 resumption the General Counsel moved to amend the complaint in Case 26–CA–12887. Farr responded that it did not oppose the motion, and by order dated November 27, 1989, I granted the motion. At the November 28, 1989 resumption the General Counsel submitted a written motion (G.C. Exh. 22)[1] uniting all allegations into a consolidated complaint, a final, single document (complaint) (3:169–171).[2] Two days later I granted the motion to unite (5:889). The following day Farr filed, in a single document (R. Exh. 9), its answer to the final consolidated complaint (6:1017).

Earlier I referred to Case 26–RC–7135, and in a moment I shall summarize the history of the principal representation events. At this point it is sufficient to note that for a time during the adjournment certain objections filed by the Union in Case 26–RC–7135 were consolidated with the complaints for hearing. On the day we resumed at Jonesboro, IUE Representative Ronnie Crider moved to withdraw the objections. The General Counsel represented that the objections paralleled certain allegations in the complaint. The General Counsel and Farr expressing their positions of no objection, I granted the Union's motion and remanded the objections to the Regional Director for NLRB Region 26 for further processing. That removed Case 26–RC–7135 from this proceeding on the express understanding that such action had no effect on the corresponding complaint allegations (3:171–174).

In the (final consolidated) complaint the General Counsel alleges that Respondent Farr violated Section 8(a)(1) of the Act by various acts, including threats and interrogation, beginning in June 1988 and extending to the present. The latter date-point is alleged as a continuing one because it alleges the November 17, 1988 issuance of an employee handbook, and maintenance thereafter, which handbook contains an allegedly unlawful no solicitation rule. Farr, the General Counsel alleges, violated Section 8(a)(1) and (3) of the Act by (1) failing to promote Bruce Carr in June 1988 to the leadman and Class A welder positions; (2) warning Bruce Carr on August 24, 1988; (3) warning Bobby Kirby on August 31, 1988; (4) failing on September 1, 1988, to promote Kirby to the position of painter; (5) as a result of the August 31 warning, suspending and terminating Kirby on July 24 and 28, 1989; and (6) discharging Bruce Carr on October 11, 1988.[3]

Admitting, in its answer, certain matters not in dispute, Respondent Farr denies the principal disputed allegations. Farr affirmatively alleges certain defensive facts plus the legal defense that the no solicitation allegation is barred by Section 10(b) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs[4] filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

With an office in Jonesboro, Arkansas, Farr Company manufactures air filtration equipment. During the past 12 months Farr sold and shipped products valued in excess of $50,000 direct from Jonesboro to points outside Arkansas. Farr admits, and I find, that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION INVOLVED

Respondent Farr admits, and I find, that the IUE is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

1. Farr Company

a. *Business, management, and union philosophy*

Farr Company manufactures commercial and industrial air filtration (dust collecting) equipment and noise abatement systems. Headquartered in El Segundo (Los Angeles) California, Farr has manufacturing plants in seven states, plus international holdings as well (1:48–49, 59–63; G.C. Exh. 5 at 4). The manufacturing plant located at Jonesboro, Arkansas, the plant involved here, manufactures air filtration equipment and opened in April 1986 (1:46, 48). Personnel Manager Darrell D. Pickney testified that in July 1988 Farr employed about 135 production employees at Jonesboro. During times material, Farr operated two shifts (all references are to Jonesboro unless otherwise indicated), with the day shift, the larger shift, working 7:30 a.m. to 4 p.m. and the evening or night shift 4 p.m. to 12:30 a.m. (1:47–48.)

Farr's Jonesboro plant has several departments in two separate buildings. Fabrication (designated as 1-s) is located in the main plant or building as are the welding shop (2-D), paint assembly (2-P), shipping, and lightweight assembly. Situated in the second building, a building with a high bay, is the Hi-Bay department (4-H) (1:49–51). The largest units are constructed in Hi-Bay, primarily by welding (1:49).

Victor Pufahl is the plant manager (12:2277, 2292). Personnel Manager Pickney reports to Pufahl (1:45) as do Marvin L. Gardner, the plant superintendent (1:45; 12:2314) and Glen A. Moring, the project engineer in charge of Hi-

[1] Exhibits are designated as G.C. Exh. for those of the General Counsel and R. Exh. for the Respondent's. The Union did not offer any exhibits.

[2] References to the 12-volume transcript of testimony are by volume and page. Most errors in the transcript are obvious. One is not. At 8:1480:18–19, I am the speaker.

[3] All dates are for 1988 unless otherwise indicated.

[4] Although lengthy (General Counsel's 77 pages plus a proposed notice; Farr's 205 pages), the detailed briefs, usually well annotated with citations to the 2610-page transcript, were helpful to me.

Bay (1:46, 54; 9:1704–1705). Gardner is in charge of production and maintenance in the main plant (12:2294). The night-shift welding supervisor at the main plant is Raymond E. Copeland; he reports to Gardner (1:46, 52; 12:2407). Comer C. Reynolds is the day-shift supervisor of the welding shop (2-D) and the paint department in the main plant (1:51; 12:2323). Danny Ray Tinch is the day-shift supervisor at Hi-Bay (10:1841–1842) and Ronald Keith Bowman is the night supervisor there (10:1942). Tinch and Bowman report to Moring (9:1704).

Farr's business philosophy toward union representation of its employees is expressed in its April 1986 employee handbook, or ''manual'' as it is designated, ''Working With Farr Company.'' At page 5 (of 23 numbered pages) the handbook provides (G.C. Exh. 5; 1:60–62, 66):

RIGHT TO WORK

> Arkansas has a ''Right to Work Law.'' This law means that no one has to pay expensive dues or initiation fees to a union to hold a job. It is against the law for a union to try to force you to pay.
>
> It is a violation of Company Policy to solicit employees for membership in any organization on working time. This type of activity includes oral solicitation and the distribution of any printed material.
>
> Farr Company agrees with the State of Arkansas that high cost union membership is not needed. This Company prides itself in treating its people fairly. We pay above average wages and provide excellent benefits. Seniority is honored and steady work is provided. No one is terminated without good cause. We listen to your problems and make every effort to resolve them. Farr Company provides you an excellent place to work without your having to give up your self-respect and money to a union.

b. *Farr's disciplinary procedure*

Later in the handbook a disciplinary procedure is provided along with a list of possible offenses, 45 in number, followed by cautionary statements. Notice is there given that the listed offenses are not all inclusive and that any conduct ''which interferes with the smooth operation of the plant or adversely affects relations among our employees may be subject to disciplinary action.'' (G.C. Exh. 5 at 20.) Offense, or rule, 41 is the subject of a complaint allegation, as I will discuss later. Offense 41 reads (G.C. Exh. 5 at 20):

> 41. Soliciting, collecting or accepting contribution[s] on Company time without authorization of management.

The paragraph preceding the list of 45 refers to the steps of what could be used as a progressive disciplinary system. The paragraph reads (G.C. Exh. 5 at 19):

> Violations of any of the following rules shall be cause for disciplinary action such as discharge, disciplinary suspension, written warning or corrective interview. In considering what disciplinary action to take, the Company will consider the seriousness of the offense committed, the employee's prior work record, his length of service and all other relevant factors. Under normal circumstances, a management representative will discuss with the employee to be disciplined the reasons for taking disciplinary action prior to imposing any discipline. If no such conference takes place prior to taking disciplinary action, the disciplined employee may question the discipline through the Procedure for Problem Review set forth in another portion of this booklet.

The problem review procedure referred to, similar to a contractual grievance procedure, has three numbered steps. Step 1 is the supervisor or the personnel department. Step 2 is personnel which forwards the complaint to the plant manager who personally reviews the matter with the employee. Step 3 consists of two employees, familiar with the circumstances, selected by the grievant, two representatives, also familiar with the circumstances, selected by management, plus the plant manager as chairman of the committee. The committee reviews the matter and recommends an action to the vice president of manufacturing, whose decision is final. (G.C. Exh. 5 at 16–17.)

Personnel Manager Pickney testified that in addition to the employee handbook, or booklet, being kept in the employee breakrooms, a blue notebook or policy manual, complementing the handbook (which also is blue) is maintained in both employee breakrooms and copies distributed to the supervisors (1:62–63; 8:1333; 9:1623–1624). In the blue notebook, a larger book than the handbook, Farr places policy statements and regulations (1:65; 8:1333).

Offense 41, the no solicitation rule, was modified, Pickney testified (8:1332, 1352), by a September 8, 1987 memo (R. Exh. 4) posted that date on the bulletin boards and placed in the blue notebook in the employee breakrooms. Pickney testified that it remained posted about 80 days, through the 1987 election (8:1332–1333, 1352; 9:1622–1623). Addressed to all employees from Pickney on the subject of ''Personnel Manual Change,'' the September 8, 1987 memo notifies employees that Offense 41 on page 20 of the handbook is amended to read (R. Exh. 4):

> Soliciting, collecting, or accepting contribution[s] during working time without authorization of Management is prohibited.

On December 8, 1987, Farr promulgated a 4-page ''Personnel Policy—Work Rules and Corrective Discipline—Farr Company—Jonesboro Plant'' (G.C. Exh. 48). The parties stipulated that the new policy, modifying the preexisting one, became effective the stated date and remained in effect at all relevant times (5:754–755). Pickney testified that the policy statement was added to the ''personnel manual'' (the blue notebook) ''that stays in the breakroom for all employees,'' and that it was posted for a time (8:1333). The purpose for promulgating the updated policy, Pickney testified, was twofold. First, it organizes the disciplinary procedure, and second, it includes the no-solicitation rule in the form as amended 3 months earlier (8:1331).

The new personnel policy expressly incorporates a progressive disciplinary concept (except for some types of ''serious'' offenses). Except for the ''serious'' offenses, violations are normally (depending on their severity) not placed into steps of the formal progressive discipline. Informal counseling is encouraged. The formal disciplinary steps normally to be taken are (G.C. Exh. 48 at 1):

First offense—First written warning
Second offense—Final written warning
Third offense—Discharge

Suspension may accompany a written warning for severe performance problems, or may be imposed as an alternative to discharge (G.C. Exh. 48 at 2).

Informal counselings predate the December 1987 reference, of course, and include such minor matters as telling an employee he is working the wrong way (1:64). Verbal (oral) warnings are not mentioned either in the April 1986 employee handbook or the December 1987 personnel policy. Nor are they mentioned, Pickney testified, in the policy manual—the blue notebook (9:1701). Actually, the blue notebook is not a third source, but simply a depository of policy memos and statements such as the December 1987 4-page personnel policy statement. Although the two depositories (the April 1986 booklet and the blue notebook) make no reference to verbal warnings, such oral warnings are a fact of life at Farr. Pickney testified they are considered, and are a form of discipline, even though not part of the formal disciplinary procedure. When documented by file memo, as it should be, the memo is placed in the employee's personnel folder. The supervisor should tell the employee he is documenting the oral warning. If the supervisor has the employee acknowledge the oral warning by requiring him to sign the memo, then it means, to Pickney, that the supervisor intended even more emphasis to the employee (8:1337; 9:1698–1700).

2. Bruce E. Carr and Bobby G. Kirby

Two employees are alleged discriminatees: Bruce E. Carr and Bobby G. Kirby. Farr allegedly discriminated against Carr in June 1988 by failing to promote him to leadman, and, after that, failing to promote him to the A class welder position. On August 24 Farr issued Carr a written warning for dishonesty, and fired him on October 11, 1988.

Farr issued Kirby a written warning on August 31, and failed on September 1, 1988, to promote him to the position of painter. As a result of the August 31 warning, Farr suspended Kirby on July 24, 1989, and fired him on July 28, 1989.

Hired when the Jonesboro plant opened in April 1986 (R. Exhs. 10, 11; 1:83; 3:260), Carr worked about 2 weeks as a general helper in Department 2-D until welding work started. He began welding on May 12 as a C class welder (1:84; 3:260). Carr was promoted to B class welder in July 1987, the position he held at the time of his discharge (1:83–84; 3:260–261). Starting in the main plant (department 2-D) at the time he was hired (4:447–448), Carr bid for one of two B class welder openings in Hi-Bay, posted November 24, 1987 (G.C. Exh. 23). He was successful and made his lateral transfer to Hi-Bay on December 7, 1987 (3:180, 271; 4:448) where he worked until his October 11, 1988 discharge.

Bobby R. Kirby worked for Farr from February 1988 to July 1989. He began work for Farr as a helper in the main plant. A month later, in March 1988, he transferred to Hi-Bay where he worked as a welder's helper on the second shift under Supervisors Raymond E. Copeland and then Keith Bowman (6:1071–1073). On August 25, 1988, Pickney posted a job notice (R. Exh. 47) for the position of a spray painter in department 2-P (8:1442). Kirby was one of two employees who unsuccessfully bid for the job (6:1074, 1075; 8:1443). The rejection notice from Pickney to Kirby is dated September 1 (G.C. Exh. 50; 6:1084; 8:1447). Farr hired Richard Barton from outside the Company (1:80–81; 6:1118; 8:1446; 9:1659–1660; 12:2366). Hi-Bay's second shift was closed from February 1 to September 1, 1989 (10:1942–1943, Bowman). Apparently about late January 1989 Kirby transferred to the filter line under its day supervisor, Larry Smith. Kirby worked there in light assembly until Farr discharged him on July 28, 1989.

3. The Union's organizing efforts

Following each of two organizing campaigns by the IUE at Jonesboro, NLRB Region 26 conducted elections. Each time the IUE lost by a substantial margin, although the Union closed the gap some in the second election. Elections were conducted November 20, 1987, in Case 26–RC–6990 and May 4, 1989, in Case 26–RC–7135. Election votes were as follows (G.C. Exhs. 2, 21q):

	Yes	*No*	*Challenged*
Nov. 1987:	17	50	1
May 1989:	32	65	3

B. *The 1986–1987 election campaign and aftermath*

1. Introduction

Evidence was adduced covering Bruce Carr's leadership events leading up to the first election and then as to some conversations afterwards with supervisors. As the initial charge was served in Case 26–CA–12887 on October 28, 1988, the statutory limitation cutoff date is April 28, 1988. 29 U.S.C. § 160(b). Over Farr's objections to relevance (staleness), materiality (knowledge admitted as to Bruce Carr), and time-barred (conversations occurred before April 1988), evidence was adduced concerning pre-April 1988 conversations with supervisors. I overruled the objections. Any prominence of Bruce Carr's union activities could be a factor for consideration. Moreover the General Counsel asserted that the evidence would show animus (3:263–266). I granted the Respondent a continuing objection to the pre-April 1988 evidence (3:270).

2. Case 26–RC–6990

Recall that Bruce Carr was hired in April 1986. About October 1986 Carr and some of the workers in Welding 2-D, plus a couple of maintenance employees, began discussing unions. Around mid to late October Carr contacted the IUE's George Clark at Forrest City (a town south of Jonesboro). Clark is the secretary-treasurer of that district of the IUE. They had several discussions then began holding employee meetings. Carr became the head of the in-plant organizing committee. Formation of the full committee took several weeks, and in April 1987 the committee began a card-signing drive. Around June 1987 Carr began wearing an IUE sticker on his helmet. He arranged meetings, invited employees to the meetings, wore union insignia, and generally was active for the Union. Ultimately a representation petition was filed (3:261–262, 267–268). As stipulated by the parties (G.C. Exh. 2), on October 2, 1987, the IUE filed the petition in

Case 26–RC–6990 seeking to represent the production and maintenance employees at Jonesboro. Conducted on November 20, 1987, the election, as I have reported, resulted in a near three to one loss by the IUE. At the election Carr served as an observer for the Union (3:268).

3. Supervisor Larry Smith and Bruce Carr

Larry Smith, it appears, was hired in September 1986 as the night-shift supervisor at the main plant, a position he held until January 1987 when he became the day-shift supervisor over the filter area and maintenance department. Smith supervised the 2-D welders (including Bruce Carr) in the fall of 1986 (10:1901–1902).

In about late November or early December 1986, Carr testified, Supervisor Larry Smith approached him when he was working in his 2-D welding booth. Smith told Carr that Farr was aware Carr had contacted the Union and had begun to hold meetings. Saying he was alerting Carr as his friend and for his own good, Smith concluded by telling Carr to be careful (3:262–267). Admitting that as early as November 1986 there was shop talk Carr was a leading supporter of the Union, and that he and Carr would talk about both job and nonjob topics, Smith denies having such a conversation nor, so far as he knows, any conversation with Carr about the Union (3:1902–1903, 1916). Carr testified in a more persuasive fashion than did Smith. Crediting Carr, I do not believe Smith.

4. Managers Victor Pufahl and Marvin L. Gardner, and Welder Ray F. Smith

Class A welder Ray F. Smith has worked for Farr over 23 years, with most of those years being at Farr's Crystal Lake, Illinois facility. He transferred to the Jonesboro plant in August 1986 where he worked with Bruce Carr on the day shift in 2-D before Carr went to Hi-Bay (5:761–762, 799, 869). On transferring, Smith was paid less because Jonesboro did not have a welder level higher than A as Crystal Lake had. Smith considers that the then personnel manager at Jonesboro, Jim Hall, had promised him the higher rate when Hi-Bay opened. The higher rate was never installed at Jonesboro. Nevertheless, Smith testified he is not unhappy with Farr because of Hall's unfulfilled promise (5:803–809).

Shortly before the November 20, 1987 election, Plant Manager Victor Pufahl, welder Smith testified, walked up to Smith at his work station. ''Ray, you've been with the company so long, I think you're on the wrong side with taking the union's side.'' Pufahl continued, Smith testified, by saying that Smith had been with Farr a long time, and that Smith would lose his profit sharing if the Union came in because ''they'll stop it.'' (I find the reference to ''they'' means Farr Company.) Smith had only signed a union card and talked to a few employees about his prounion sentiments, and at this time he had not worn any union insignia. He does not know how Pufahl had learned he was a union supporter (5:777–781). Admitting he probably had spoken with employees individually to ask them for their vote, Pufahl denies having any such conversation, or its components, with welder Smith (12:2279–2280, 2289).

Shortly after noon the following day, Smith testified, 2-D Welding Supervisor Comer C. Reynolds asked whether ''Mary'' (Plant Superintendent Marvin L. Gardner) talked with him. ''No,'' replied Smith. Reynolds called Gardner and then sent Smith to see Gardner. As Smith walked into Gardner's office, Gardner closed the door. Just the two were present. Gardner said, ''We don't want a union, we don't need a union.'' After some undescribed conversation, Smith asked whether he would lose his profit sharing. ''No,'' Gardner said, Farr would not take away anything it had given even if the union came in (5:781-782). As Smith rose to leave Gardner said (5:782–783; 858–860): ''You know what happens to people that work for the union.'' Interpreting Gardner's remark as meaning Gardner would fire him for his union support, welder Smith replied that he simply would return to Illinois and get another job (5:783, 858). Smith and Gardner have known each other for years, and this instance is the only threat Gardner has ever made to him. Smith believes Gardner speaks truthfully (5:858–860).

Testifying that in a couple of conversations he had with Smith before the first election Smith had brought up the Union, Gardner denies any such conversation as described by Smith, denies ever talking to Smith about the effect of the Union on the profit sharing, and denies the implied threat (12:2296–2297). Gardner testified he was not given a role in the 1987 election campaign and did not try to persuade employees to vote no (12:2314–2315). Gardner states that Smith has mentioned that he would like to return to Illinois (12:2297).

Although Smith is not as articulate a witness as either Pufahl or Gardner, he appeared more sincere and truthful, and Smith testified in detail. I credit Smith over both Pufahl and Gardner. It is not necessary that I determine how Pufahl learned of Smith's involvement with the IUE, although it seems clear that talk, loose or deliberate, reached the ''front office.'' Whatever his source, Pufahl, I find, made the November 1987 remarks Smith attributes to him. Again because of Smith's superior demeanor, I credit him over Gardner. Although Smith believes the former personnel manager, Jim Hall, lied to him respecting a higher pay rate in the future, it is clear that Smith—a humble man—enjoys his work and likes Farr Company. His disappointment over his pay scale did not, I find, affect the integrity of his testimony.

My findings as to the remarks of Pufahl and Gardner are significant. First, Pufahl, and Gardner are first and second in command at Jonesboro. Although Pufahl's understanding of Farr's position on the profit sharing may have been garbled, his statement to Smith was in the form of a threat—Farr would react to a union presence by eliminating profit sharing (or taking back any money it had deposited in employee profit sharing accounts). Because Pufahl's threat is outside the statutory limitations period, it may not be found an unfair labor practice. It does, however, reflect animus. Uttered during this organizational period, Pufahl's threat is not stale and outdated, but fresh and current—reflecting, I find, animus.

Having the benefit of an extra 24 hours, Gardner did not threaten the profit-sharing benefit as Pufahl had done. Gardner got more personal. Initiating the conversation with the admonition that Farr neither needed nor wanted a union, Gardner closed with a pronouncement which Smith, correctly I find, interpreted as a threat of discharge if Smith actively supported the Union. That Farr has not implemented Gardner's threat does not cancel it. Made by Jonesboro's plant superintendent, this serious threat is a frightening expression of

both the will and the power to satisfy Farr's antiunion animus by outright discharge of active union supporters.

Before proceeding to the next topic, I shall describe a brief procedural point. In producing, pursuant to 29 CFR § 102.118(b), prehearing statements for cross-examination of one of the Government's first employee witnesses, the General Counsel indicated an intention to furnish copies but not the originals. The stated basis was that the practice of NLRB Region 26 is not to turn over the originals of prehearing affidavits and statements unless the copies are illegible. I directed the General Counsel to furnish the originals to Farr's counsel (5:798). Implied by the regulation is the concept that the originals should be produced. Moreover, differences in ink colors, slight differences in pen stress at significant points, and similar details that usually do not show up on photocopies, are additional reasons why the originals (unless lost) must be furnished to a respondent who is about to begin cross-examination of the Government's witnesses. Indeed, the General Counsel's national policy, which describes when courtesy copies also are to be furnished, explicitly states that the originals are to be produced. 1 NLRB Casehandling Manual 10394.11 (March 1983).

5. Supervisor Comer C. Reynolds and Bruce Carr

For a time after the November 20, 1987 election Bruce Carr continued wearing the IUE sticker on his helmet (3:268–269). About a week after the election, Carr testified, 2-D Day-Shift Supervisor Comer C. Reynolds asked Carr why he had to be so rebellious by continuing to wear the sticker. Carr replied that even though the Union had lost the election, he still felt the same way (3:268–269). Admitting his awareness that Carr began wearing the IUE sticker before the first election, and that he does not know that Carr ever stopped wearing it, Reynolds denies asking him about the IUE sticker or why he was so rebellious (12:2337–2338, 2387–2388).

Carr testified in a more persuasive manner than did Reynolds. Believing Carr, I do not credit Reynolds' denials. Although Reynolds' comment, standing alone, is relatively mild, it reflects that Farr's official policy, expressed in the employee handbook, in practice extends beyond the desire to remain nonunion. Thus, Reynolds views Carr's own (statutorily protected) expression as being not simply less worthy than Farr's desire, but being that of a rebel—someone outside the established system and in the position of an enemy of the accepted order.

6. Personnel Manager Darrell D. Pickney and Inspector Bobby E. Loueallen

With 15 years of welding experience, Bobby E. Loueallen applied at Farr in March 1988 for a welder's position. Farr hired him as a quality control (QC) inspector. Loueallen worked at Farr from March to October 1988 when he quit to work for another company. Personnel Manager Darrell D. Pickney conducted the hiring interview. During that interview, Loueallen testified, Pickney asked whether Loueallen was a member of a union or had ever been a member of a union. ''No,'' answered Loueallen. Pickney, Loueallen testified, said that Farr had just gone through a union organizing campaign and that as its policy Farr did not want a union at Jonesboro (5:898–900, 964).

Confirming the basic fact of a March 1988 interview for welders and a QC inspector, Pickney denies the remarks attributed to him by Loueallen. According to Pickney, it was Loueallen who injected the topic of unions. Under the category of ''Special Training,'' on the application form, Loueallen had listed a 4-year journeyman apprenticeship. When Pickney asked what that involved, Loueallen replied that it was an apprenticeship with a union (whose name Pickney cannot recall). Volunteering that he had belonged to unions, Loueallen said he hoped that would not disqualify him from being hired. Laughing, Pickney said, ''Hey, I'm an ex-president of a local union. You know, that's not going to have nothing to do with it. You know, just [because] a person belonged to a union doesn't make them bad.'' (8:1548–1552).

Pickney explains that earlier he had worked as a furnace tender for the Arkansas Glass Container Corporation in Jonesboro. During his employment there, Pickney, from the late 1970s to 1981, was president of Local 131 of the GBBA, the Glass Bottle Blowers Association. In fact, Pickney testified he has hired at Farr some of his former GBBA members (8:1551–1552).

Although it would be natural enough for Pickney to point out Farr's nonunion policy in the employee handbook, I observe that Loueallen's version seems internally inconsistent. Why would he answer ''no'' to a question of union membership if he had listed his 4-year journeyman apprenticeship on the application form? Loueallen was not asked at the hearing to explain this and neither party offers a resolution in the briefs. Pickney's version being plausible, and Loueallen's internally inconsistent, I find the evidence insufficient to support Loueallen's version.

C. *The 1988–1989 election campaign*

For a time after the November 20, 1987 election in Case 26–RC–6990, Bruce Carr continued wearing the IUE sticker on his helmet (3:268–269). Sometime in late January or early February 1988, after he was transferred to Hi-Bay, Carr stopped wearing any IUE stickers or insignia (3:270). About May 11 or 12, 1988, following his unsuccessful bid for an A class welder opening in Hi-Bay, Carr painted or stenciled ''IUE'' on his hard hat (2:292–293).

Also in May 1988 the IUE's George Clark told Ronnie Crider, an international representative since February, that the IUE might begin another campaign at Farr. Crider testified that Clark actually assigned him that task the latter part of August. Crider contacted Carr and Carr arranged a meeting at Larry's Restaurant for September 28. Four employees (Bruce Carr, Jerry Greer, Bobby Kirby, and Kenneth Heindselman) attended and signed authorization cards, Crider testified. Carr, Kirby, and Heindselman, along with Tammie Gulley and Alan Jones, attended the second organizational meeting, held October 7 at Larry's. At Larry's, Crider testified, the meetings were in the open restaurant, rather than in a private dining area, in the midst of other customers (3:254–259; G.C. Exh. 31). Although Larry's apparently is a popular restaurant, there is no evidence any statutory agent or supervisor of Farr either saw them there or that Farr learned of the meetings from reports of others.

Notwithstanding Crider's testimony that the employees signed cards at the September 28 meeting (3:257), at least Bruce Carr (3:329) and Bobby Kirby (5:1087), if not others,

had signed their cards earlier, on September 15, the date reflected on their cards (G.C. Exhs. 41, 49). On March 15, 1989, the IUE filed a petition in Case 26–RC–7135, again seeking to represent the production and maintenance employees at Jonesboro. As I summarized earlier, the Union lost again, although the margin was closer (G.C. Exhs. 2, 21q). The IUE filed objections on May 11, on which a notice of hearing issued June 28, and on September 1, I granted the General Counsel's motion to consolidate the objections with this case (G.C. Exhs. 21q, 21s). Nevertheless, as I noted earlier, at the November 28, 1989 resumption I granted the Union's motion to withdraw its objections and I remanded Case 26–RC–7135 to the Regional Director for NLRB Region 26 for certification of results of the election (3:171–174).

D. *Allegations of 8(a)(1) Coercion*

1. Supervisor Ray Copeland

a. *June 30, 1988 threat of discrimination*

Complaint paragraph 8(a) alleges that in about June 1988 Farr, acting through Supervisor Ray Copeland, violated Section 8(a)(1) of the Act by informing an employee ''that another employee had not been promoted because of the employee's union activities and support.'' Bobby E. Loueallen testified in support of this allegation.

Mentioned earlier, and to be discussed later in more detail, in late June 1988 Carr lost out in his bid for an A class welder position in Hi-Bay. Former Quality Control Inspector Bobby E. Loueallen testified that a few days after Farr's decision on the A class welder bids (or about June 30) he had a conversation in the main plant with Raymond E. Copeland, the night-shift welding supervisor (5:913–914). Besides Copeland and Loueallen, Maintenance employee Dewayne House was present and a witness, Loueallen testified. Although Bobby Kirby ''was standing there,'' Loueallen, at one point, testified that he does not know whether Kirby was ''in the conversation'' (5:915). House did not testify. During his own testimony Kirby was not asked about this conversation. On this occasion, Loueallen testified, Loueallen asked Copeland why Bruce Carr did not get the A class welder's promotion. According to Loueallen, Copeland replied, ''Because he had IUE on his hat.'' (5:194.)

Acknowledging that Loueallen asked him the question, Copeland asserts he told Loueallen that he does not discuss one employee's personnel matters with another hourly employee. Neither Kirby nor House was present, Copeland states, and he denies saying anything about Carr's promotion failure having anything to do with the IUE insignia on Carr's hat (12:2425–2426). On brief Farr asserts that Loueallen's testimony reveals he did not include in his pretrial affidavit a report about Copeland's purported IUE sticker/helmet remark (Br. 25 fn. 18). However, as the transcript reflects, at that point during cross-examination questions about the promotion conversation were commingled with a somewhat similar conversation Kirby allegedly had with Copeland after Carr's discharge. (5:958–962.) On redirect examination by the General Counsel, Loueallen confirms that his pretrial affidavit does contain a report of Copeland's promotion rejection remark (5:964–965).

In support of Copeland's version, Farr points to testimony of Kirby and others that the employees view Copeland as a truthful person and the only supervisor worthy of trust (Br. 25). Those very traits could explain, however, the answer which Loueallen attributes to Copeland. In any event, I credit Loueallen even though Copeland's version that only he and Loueallen were present may well be correct. On the critical portion, Copeland's alleged IUE remark, Loueallen testified with a more persuasive demeanor than did Copeland. Such a coercive remark tells employees that union activists will be discriminated against if they openly support the IUE. Crediting Loueallen, I find that Farr, as alleged, violated Section 8(a)(1) of the Act by the coercive June 30, 1988 remark of Supervisor Copeland. *Studio S.J.T.*, 277 NLRB 1189, 1200 (1985).

b. *October 12, 1988 implied threat of discharge*

Complaint paragraph 8(b) alleges that about October 12, 1988, Farr, acting through Supervisor Ray Copeland, violated Section 8(a)(1) of the Act by informing an employee ''not to display union insignia on his hard hat.''

Bobby Kirby testified that about a week after Bruce Carr's October 11 discharge (or about October 18, 1988) he had a conversation with Bobby Loueallen and Dewayne House as they stood outside the breakroom in the main plant. Supervisor Ray Copeland, who had walked over from the breakroom, was listening. As the three employees, on break, discussed Carr's discharge, Kirby said he had removed the IUE sticker from his helmet because he thought that was why Carr had been fired. Kirby then asked Copeland (the only Farr supervisor Kirby felt was trustworthy) whether he thought it would be best if Kirby left the sticker off. Copeland said he thought it was ''best.'' (6:1088–1089, 1142–1148.) House did not testify. Copeland denies that such a conversation ever occurred, asserts that the IUE stickers were of no concern to him, and claims that no one in management had ever expressed to him any concern over such insignia (12:2426–2429).

Former Quality Control Inspector Bobby Loueallen, a disinterested witness, testified that the conversation occurred either the night of Carr's October 11 discharge or the very next night. On direct examination Loueallen stated that after Kirby commented on why Carr had been fired, Supervisor Copeland advised him to remove the IUE sticker from his helmet as Carr's discharge could have been because of the sticker (5:920–921). On cross-examination, Loueallen appears to concede that his pretrial affidavit does not report the conversation because it probably ''slipped'' his mind. Loueallen recalled the incident while engaged in pretrial preparation with the General Counsel (5:960–962).

Kirby and Loueallen each testified in a persuasive fashion and I credit them. It is not uncommon that a witness (Loueallen, here) fails to report an incident in an affidavit taken during the investigation stage but remembers the incident during the intensity of pretrial preparation.[5] Supervisor Copeland struck me as a person who, having been candid with employees who trusted him, but subsequently learning that Farr, his employer, does not appreciate such candor, has

[5] See *Baker Mfg. Co.*, 269 NLRB 794, 815 fn. 72 (1984), modified on other point 759 F.2d 1219 (5th Cir. 1985).

found it wise to testify in a manner which conforms to the position taken in this case by Farr.

In crediting both Kirby and Loueallen, I recognize that their versions are not a perfect match. That is not uncommon in the testimony of honest witnesses. Kirby's version, however, is based on a pretrial affidavit which he gave on November 2, 1988, barely 3 weeks after the event (6:1146). Although Loueallen's early dating of the conversation seems more logical than Kirby's dating of several days, it is possible Loueallen's version contains his expression of the meaning of Kirby's question and Copeland's answer in the context of the conversation that preceded the exchange. Nevertheless, the effect of Loueallen's version is a corroboration of Kirby's credited testimony. In reality, therefore, Copeland said that if Kirby wanted to avoid Carr's fate of discharge, Kirby would be well advised to leave the IUE sticker off his helmet. That is an implied threat of discharge for exercising Section 7 rights. The threat is coercive notwithstanding that Kirby reapplied the IUE sticker to his helmet shortly after Copeland's remark (6:1093). The test of legality does not depend on whether a threat successfully intimidates an employee.

2. Supervisor Ronald Keith Bowman

a. *July 21, 1988 interrogation of Bruce Carr*

(1) Evidence

Complaint paragraph 9(a) alleges that ''in or about July 1988'' Respondent, acting through Supervisor Keith Bowman, violated Section 8(a)(1) of the Act by interrogating employees regarding their union support and activity. Bruce Carr testified in support of this allegation.

Before July 1988, Raymond E. Copeland, the night-shift supervisor over the main plant, covered Hi-Bay as well (12:2408, 2445). Ronald Keith Bowman began working for Farr on July 18, 1988. He was hired as the second-shift supervisor over Hi-Bay. A reduction in force (RIF) on February 1, 1989, resulted in his working at various projects for Farr until the second shift resumed in Hi-Bay on September 1. At that time he returned to supervising Hi-Bay's second shift, a position he was holding when he testified in December 1989 (10:1941–1943). On assuming his position as supervisor in July, Bowman had Bruce Carr as one of his welders (3:317–318; 10:1943–1945). Bowman testified that he spent his first 3 days on the day shift before assuming supervision over Hi-Bay's night shift on Thursday, July 21, 1988 (11:2086–2087).

Shortly after Bowman was hired as a supervisor in July 1988, Bruce Carr testified, Bowman asked Carr what the ''IUE'' on Carr's hard hat referred to. ''The International Union of Electrical Workers,'' Carr replied. ''Why do you wear that? You guys don't have a union Do you have a campaign going or something?'' Bowman asked. ''Well,'' Carr responded, ''We had an election last year and we're working on another one.'' Carr testified that ended the conversation (3:319).

Denying any such conversation, Bowman explains that Pickney, on hiring him, told him there was an IUE organizing campaign in progress. Bowman, who concedes he observed that a couple of employees, Carr and J. D. ''Jerry'' Greer, were wearing IUE stickers on their hard hats, adds that Pickney gave him no instructions on what to do if he encountered union matters on the job (11:2087–2089, 2215–2216).[6] Before coming to Farr, Bowman testified, he worked for 13 years at FMC corporation in Jonesboro, with 1.5 of those years as a supervisor. He went through union campaigns there and was trained on what a supervisor may say and not say during an organizing campaign. As a result, Bowman testified, at Farr he never discussed the Union with the employees (11:2105–2107). On cross-examination Bowman concedes that FMC had no union organizing campaign while he was a supervisor (11:2120–2122).

I credit Bruce Carr who testified with a more persuasive demeanor, and with more conviction, than did Bowman. Moreover, it seems likely that had Pickney mentioned union organizing to Bowman he would have covered with him the ''Do's and Don'ts'' for organizing campaigns.

(2) Analysis

Arguing that Bowman's questions about a union campaign violated the Act, the General Counsel cites cases such as *Rood Industries*, 278 NLRB 160, 161–162 (1986). Farr counters by arguing that even if I credit Carr, Bowman's questions are not coercive applying the criteria of *Baptist Medical System v. NLRB*, 876 F.2d 661 (8th Cir. 1989). Agreeing with Farr, I shall dismiss complaint paragraph 9(a).

Unlike the supervisor's question in *Rood* (''who is talking union?''), Bowman's questions are consistent with the natural curiosity of a person new to the Company and are not phrased in a way reasonably to indicate a purpose of learning the number of union supporters, the names of the leaders, or similar information. Had Bowman persisted in his questioning, a different conclusion might be required, particularly since his questions reflect that he at least knew the employees were not represented by a union and in light of his question whether a campaign was in progress. However, Bowman was new,[7] the questions apparently occurred at or near Carr's work area, and Carr, who openly was wearing an IUE sticker, truthfully answered Bowman's limited questions. Finding that the circumstances were not coercive, I shall dismiss paragraph 9(a).

b. *September 26, 1988 ''troublemakers'' comment to J. D. Greer*

(1) Evidence

Complaint paragraph 9(b) alleges that about September 1988 Farr, acting through Supervisor Bowman, violated Section 8(a)(1) of the Act by telling an employee ''that there were some people who were trying to make trouble by bringing a Union into the plant.'' Jerry D. Greer testified in support of this allegation.

Welder J. D. Greer first worked at Farr in 1987, and again from February to October 1988. During his second stint he transferred around July from 2-D to Hi-Bay where he was promoted to B class welder. R. Keith Bowman was his supervisor in Hi-Bay. Bruce Carr persuaded Greer to become

[6] At some point, unidentified as to time or context, Pickney did give Bowman some written materials on what supervisors may say and not say in an organizing campaign (11:2120).

[7] I find that Bowman asked his questions his first night on the second shift, July 21, 1988. Having worked on the first shift for 3 days, Bowman had the opportunity to observe that the employees were unrepresented.

interested in the Union, and in about ''early summer'' Greer painted, or stenciled, ''IUE'' on his hard hat (7:1235–1238). For a fee, Greer hauled hay for Carr one day in 1987 (7:1250) and they sometimes socialized after work (7:1250–1252). Greer quit his job at Farr on October 7, 1988, and since June 1989 he and Bruce Carr have operated a welding shop on an equal partnership basis (7:1250, 1278). Although Greer testified that he quit Farr because of family problems with his evening shift work (7:1278), the day before he quit he received a first written warning (G.C. Exh. 7) for poor quality work (7:1274–1275). Not long after quitting Farr, Greer filed an unfair labor practice charge over the warning. The charge was withdrawn when NLRB Region 26 advised that it would be dismissed for insufficient evidence (7:1279). Greer concedes he did not like Bowman's attitude and, in an understatement, admits he felt no love for Bowman (7:1304). Greer testified that he quit in part because he did not get along with Bowman (7:1304).

According to Greer, a week or two before he quit, or about September 26, 1988, Supervisor Bowman assisted him in unloading some scrap steel onto pallets on a truck. As the two stood there after performing the task, Bowman spoke of the problems (undescribed) in Hi-Bay and what he was going to do to correct them. With Greer wearing his ''IUE'' stenciled hard hat, Bowman said there were some ''troublemakers'' in Hi-Bay trying to bring in the Union, naming Bruce Carr as one of the troublemakers. Bowman asked Greer what good he thought the Union would do.[8] Greer said he thought it would help the employees to have a little more say-so in what went on. Bowman said he did not think it would do any good. Greer reported this in an NLRB affidavit dated November 1, 1988 (7:1240–1242, 1279–1283). Greer asserts that, despite his dislike for Bowman's attitude, at times they had friendly conversations (7:1283–1284).

Supervisor (Raymond) Keith Bowman denies having any such conversation with Greer. Because of the written materials he received at FMC and from Pickney at Farr, Bowman asserts that he knew better than to discuss union matters with employees (11:2105–2106, 2120).

Pointing to an incident of apparent vandalism about September 16 to a vehicle of Supervisor Bowman, Farr contends it is highly unlikely such a polite exchange could have occurred (Br. 48). With testimony limited to any showing of bias on the part of Greer, I overruled objections by the General Counsel and permitted Farr to elicit some evidence respecting events leading up to the purported vandalism (7:1290, 1297, 1300). As Greer describes matters, several Farr employees were standing on the parking lot of the Eagles Club about 1:30 a.m. As some of the employees, and perhaps other patrons, were still drinking beer, apparently the club had just closed from its Friday night entertainment. There were three or four groups of people, and not simply one group. Greer went among the groups rather than remaining with one group. He heard talk there about ''getting even'' with Bowman. Whatever reason was given on the parking lot for ''getting even'' is not stated by Greer. One group left, apparently to go to Bowman's house, but Greer went home and did not go by Greer's house. Greer heard later that a ''hailstorm'' had hit Bowman, although there was no hailstorm that night (7:1290–1301).

Bruce Carr also gave limited testimony on the topic. Carr testified that he was one of those on the parking lot. Several persons there were unhappy with Bowman, and someone, not Carr, suggested that Bowman deserved a ''blanket'' party—an event in which a blanket is thrown over a person's head and he then receives a good ''whopping.'' (4:621–624.)

Because Greer did not participate in any vandalism, or planning of such, that was inflicted on Bowman's property, I find that any such incident has no bearing on Greer's credibility. Greer concedes that Bowman was not one of his favorite people, that he disliked Bowman's (undescribed) attitude, and that at times (much of the time, apparently) they did not get along. I consider that dislike in resolving credibility.

(2) Analysis

Greer's testimony has a hollow ring. The work itself may have been an actual event, but the ''troublemakers'' remarks appear to be an embellishment. It seems strange that Bowman would comment about ''troublemakers,'' naming Bruce Carr, bringing in a union. After all, Greer—sporting the painted ''IUE'' sticker on his hard hat—was openly one of those ''troublemakers.'' Nothing in their relationship or the circumstances suggests any reason why Bowman would in one breath confide in Greer, and in the next inquire of one of those same troublemakers (Greer) what good Greer thought the Union would do. It makes no sense.

Allowing for the occasional nervousness displayed by the 23-year old Greer as he testified, I do not believe Greer on this topic. Finding that Bowman did not make the comments Greer attributes to him, I shall dismiss complaint paragraph 9(b).

3. Personnel Manager Darrell D. Pickney

a. *August 30, 1988 rumor meeting with Bobby R. Kirby*

(1) Introduction

Complaint paragraph 10(b)[9] alleges that on or about August 31, 1988, Respondent Farr, acting through Personnel Manager Darrell D. Pickney, violated Section 8(a)(1) of the Act by:

> (1) interrogating an employee regarding the employee's union support and activity;
>
> (2) interfering with, restraining, and coercing its employees by telling an employee that wearing a union hat gives the impression that the employee has an attitude problem; and
>
> (3) threatening an employee by telling him that employees with attitude problems would not be promoted.

The three allegations arise from a meeting alleged discriminatee Bobby R. Kirby had with Personnel Manager Darrell D. Pickney and Glen A. Moring, project engineer over Hi-Bay, on August 30, 1988. Some background is necessary. In the latter part of August, Farr's second-shift spray painter, Paul Ishmael, was terminated when he did not return

[8] The complaint contains no allegation pertaining to this question by Bowman.

[9] The General Counsel withdrew complaint par. 10(a) (8:1556–1557).

within 3 days after the end of his 2-week summer military leave (12:2354–2356). Personnel Manager Pickney posted the department 2-P vacancy for bid on August 25 (1:79; 8:1442; 12:2356; R. Exh. 47). The posting was removed late Friday, August 26, with employees Bobby R. Kirby and Kenneth Heindselman having submitted bids (1:80; 6:1075, 1097, 1128; 8:1442–1443; R. Exhs. 48, 49). On Monday, August 29, 2-D Welding Supervisor Comer C. Reynolds (who also supervised the paint department, 12:2323, 2354, 2391–2392) administered a 10–15 minute painting test first to Kirby and then to Heindselman around 4 p.m. According to Reynolds, neither passed. The next day, August 30, Reynolds so informed Pickney (8:1445; 12:2358–2365). Respondent's failure to promote Kirby to painter is the subject of complaint paragraph 12(b)(2), discussed later.

(2) The rumor meeting in Pickney's office

Bobby R. Kirby worked at Farr from February 1988 to July 1989. Hired as a helper in the main plant, he transferred to Hi-Bay about March 1988 where he worked as a welder's helper on the second shift under Supervisors Raymond E. Copeland and then Keith Bowman (6:1071–1073). Kirby testified that after he submitted his August 26 bid for the painter's position he heard a rumor that Farr had already hired a painter for the position even before posting it for bid (6:1076–1077, 1103). Kirby vigorously complained about this to employees and to several supervisors and managers (6:1077, 1103). Although having no jurisdiction over the painter position, Moring became involved in the episode when (Ronald) Keith Bowman, Kirby's immediate supervisor, notified Moring that Kirby was upset and had left his work station and gone to the main building where he spoke to employees about the painter's job. Moring in turn reported this to Pickney (9:1764–1765).

Pickney testified that Kirby had left his work station in Hi-Bay and had complained to some employees in the main building that the bid procedure was a joke, that Farr had hired someone even before the posting, and that Farr was being unfair to him (8:1448). Bowman testified that on August 29 Kirby told him of the rumor. Bowman was unsuccessful in telling Kirby it was not true, to return to work, and not worry about it (10:1960–1964). Pickney (8:1448–1449) and Hi-Bay's Glen Moring (9:1764–1766) testified that they investigated Kirby's rumor sources (two employees in the main building plus Supervisor Raymond E. Copeland) and that they all denied being the source. Pickney and Moring then called Kirby into Pickney's office for an interview that August 30.

What transpired in Pickney's office that day is in dispute, although the witnesses agree the meeting began with Pickney, Moring, and Kirby, and that Supervisor Raymond E. Copeland also was present. Pickney and Moring contend that Copeland was called in after the meeting had progressed, but Kirby seems to suggest that Copeland was there at the beginning.

Kirby testified that Pickney and Moring opened the meeting by asking him why he was upset. Because, Kirby explained, he had heard that the painter's position had already been filled. Pickney and Moring then assured him the job had not been filled (6:1079, 1105, 1107–1108). Pickney, Kirby testified, asked Kirby why he was wearing ''IUE'' on his hard hat. Because he felt he had been ''messed around with'' a lot, Kirby answered. When Pickney asked what he meant, Kirby explained that earlier in the year he had bid on a maintenance job but had received no response (6:1079–1080, 1105). Kirby could not recall Pickney's response at that point, but moments later Pickney stated it looked to him that Kirby had an attitude problem with ''IUE'' on his hard hat. One of the main items he looks at for promotions, Pickney continued, is the attitude of employees. Kirby made no reply. At the end of the meeting Pickney, Kirby testified on direct examination (6:1080), told Kirby he had ''better go back out to Hi-Bay and do a good job.'' On cross examination Kirby modified the ''better'' to say Pickney ''insinuated to me that I'd better watch my step.'' When I then asked for his best recollection of what Pickney said, Kirby replied (6:1110): ''Go back out to Hi-Bay and do a good job.'' Kirby does not describe Pickney's tone of voice or facial expression. Two days after this meeting, Kirby testified on cross-examination, Pickney gave him the name of the more senior and experienced person who earlier had been selected for the maintenance position (6:1106).

Pickney (8:1449–1452; 9:1665) and Moring (9:1776–1772, 1779–1781, 1810–1814) disagree with Kirby concerning what transpired in Pickney's office. Aside from certain differences, their versions essentially are the same although Pickney is more definite. They told Kirby the painter's job was still open. Pickney said they had checked Kirby's sources and the sources did not support him. Kirby, according to Pickney, then said that (supervisor) ''Ray Copeland told me you'd already hired somebody.'' Pickney then paged Copeland. Kirby became nervous as they waited for Copeland. When Copeland arrived and Pickney asked Kirby to state where he heard the rumor, Kirby said, ''Well, maybe it wasn't Ray, maybe I heard it somewhere else.'' (Moring asserts that Copeland was asked if he had told Kirby the rumor and Copeland said, ''No.'' When Kirby said maybe it was someone else Moring asked who, but Kirby said he did not know. 9:1768.) Kirby denies that he told others in the plant that Copeland told him the rumor, states that Copeland told him no one had the job so far as he knew, and asserts that Copeland did not speak in the meeting in Pickney's office (6:1103–1105).

Pickney testified that during the meeting, which lasted about 30 minutes, Kirby was angry, accused them of lying to him and of being dishonest. They repeatedly assured Kirby that the job posting was sincere, that Kirby needed to have confidence in management, that he could not go around saying Farr's policies were a farce and management was lying, that there needed to be mutual trust, that Kirby's poor attitude toward management had to change, that Farr wanted to promote from within, and that he would be given every consideration. Kirby finally said, ''Well, maybe you're right,'' and Pickney said, ''Bobby, just go on back out there, do your best job, and things will work out for the best.'' Pickney denies commenting about Kirby's hard hat or anything he was wearing on it (8:1451). In his opinion, Pickney asserts that he did not say anything that Kirby could have misconstrued as a threat to fire him. In fact, Pickney (8:1450–1452; 9:1665–1666) and Moring (9:1768–1769, 1812) believed (and testified) that they felt the meeting was constructive and concluded with Kirby leaving satisfied.

Moring confirms that Pickney did tell Kirby he had to develop a better attitude toward Farr as far as having faith that

Farr will follow the bidding procedure. Nothing was said linking attitude to unions, nor was anything said about union hats or union insignia on hard hats. The meeting ended with Pickney saying to Kirby, ''I've got nothing else to say. Go on back out to the Hi-Bay and get with it.'' (9:1769–1770.) Although he testified about other matters, Copeland was not asked about this meeting.

(3) Conclusions postponed

Farr issued Kirby a warning based on the events that occurred when Kirby returned to Hi-Bay, and complaint paragraph 12(b)(1) alleges the warning to be a violation of Section 8(a)(3) of the Act. I discuss the warning later when I cover the discrimination allegations. Because the Hi-Bay and related events bear directly on resolving credibility here, I postpone resolution of the rumor meeting dispute until later.

b. *October 1988 remarks at preinventory meeting*

The General Counsel alleges that about October 1988 Farr, acting through Pickney, violated Section 8(a)(1) of the Act by (1) ''blaming employees who supported the Union for inventory problems,''[10] and (2) threatening to discharge its employees if they engaged in union activities.[11] For support of both allegations, which pertain to a single conversation, the Government relies on the testimony of former QC Inspector Bobby E. Loueallen (5:926; 8:1558).

Recall that Loueallen worked at Farr from March into October 1988 (5:899, 950) at which point he quit for employment with another company (5:926, 964). While at Farr, Loueallen did not engage in any union activities because he could not see how that would help him advance to higher positions at Farr (5:963). After Bruce Carr's October 11 discharge (but still in October), Loueallen assisted management in a plant inventory by serving as an auditor (5:921–922).

Attending a preinventory meeting with other auditors and management in the front office, Loueallen heard Plant Manager Victor Pufahl ask Pickney if they were going to have problems as they had the previous year. Loueallen asked what problems did they have. Responding first to Loueallen, Pickney said that the counts were off, blaming the problem on the employees campaigning for the Union. Then answering Pufahl, Pickney said he did not feel Farr would have that problem ''because the union people were no longer with them.'' (5:922–923, Loueallen.) Pickney (8:1554) and Pufahl (12:2283–2284) testified that they attend only some of the inventory meetings, and neither recalls attending a meeting when Loueallen was present. Moreover, each denies that remarks such as Loueallen describes were made. Both deny that any union threats were made at any such meetings they attended.

I credit Loueallen whose description was specific and certain and whose demeanor was favorable. By contrast, Pufahl and Pickney were not as specific or certain and their demeanor was not favorable. Crediting Loueallen, I nevertheless shall dismiss paragraphs 10(c) and (d) because the context of Pickney's remarks was not coercive. *Pullman Trailmobile*, 249 NLRB 430, 431 (1980), on which the General Counsel relies, is distinguishable. In *Pullman* it is clear that remarks of getting rid of a problem in a department referred to a union steward because of the number of grievances he filed. Pickney's remarks are reasonably subject to the interpretation that Pickney believed the union supporters either were incompetent in the previous inventory or had sabotaged that inventory. Thus, even if the ''no longer with [us]'' remark means Farr fired the union supporters, rather than that they simply quit, the remark would mean only that Farr fired them for incompetence or sabotage, or for other lawful reasons pertaining to later incidents. In any event, as Pickney's remarks do not appear in a coercive context, I shall dismiss complaint paragraphs 10(b) and (c).

4. Handbook rule restricting solicitations

a. *Facts*

Complaint paragraph 15 alleges that Respondent Farr violated Section 8(a)(1) of the Act since November 17, 1988, by maintaining a rule prohibiting employees from:

> Soliciting, collecting or accepting contributions on company time without authorization of management.

The rule is Farr's rule, or offense, 41 quoted earlier. In its answer (R. Exh. 9) to the complaint (G.C. Exh. 22), Farr asserts that in April 1986 it issued an employee handbook containing the rule, but it denies the balance of complaint paragraph 15. Pleading further, Farr avers it notified employees on September 8, 1987, of a modification, and states that the complaint allegation is barred by Section 10(b) of the Act. On brief Farr does not explain its 10(b) position. Asserting that maintenance of an invalid no-solicitation rule within the limitation period, as distinguished from promulgation of the rule, is unlawful, the General Counsel cites and relies on *K & S Circuits*, 255 NLRB 1270, 1291 fn. 42 (1981).

Advised by Farr's lawyers to modify the rule, Pickney testified (as summarized earlier) that he did so by posting a September 8, 1987 memo (R. Exh. 4) advising all employees that effective immediately offense 41 listed on page 20 of the employee handbook is amended to read (8:1332–1333, 1352; 9:1623):

> Soliciting, collecting, or accepting contribution[s] during working time without authorization of Management is prohibited.

There is no allegation of disparity of treatment respecting approvals granted (if any) for work time solicitations.

Recall from the background summary that in December 1987 Farr issued and posted a modified discipline policy (G.C. Exh. 48) which includes the September 1987 version of rule 41. However, as the rules are not numbered in the policy statement, the amended no-solicitation rule is not flagged for the reader's attention by a rule 41 which corresponds to the rule number in the employee handbook. As I noted in the background summary, Pickney testified that the policy statement was added to the personnel manual (the notebook) copies of which remain in the employee breakrooms (8:1333, 1355). During orientation interviews of new employees, Pickney testified, Pickney informs them of the September 1987 rule change and shows them the modified rule in the policy manual on file (since December 1987)

[10] Complaint par. 10(c). Although blaming union supporters for inventory problems does not, without a coercive context, constitute a violation of the Act, no issue was raised concerning the sufficiency of the allegation.

[11] Complaint par. 10(d).

in the breakrooms as he escorts them on orientation tours (8:1334).

On January 6, 1989, Pickney testified, he posted, distributed, and inserted in the policy notebook, a memo to all employees on ''Personnel Policies.'' (8:1353–1356; 9:1623.) The text of this memo reads (R. Exh. 5):

> When you began your employment with Farr Company, you received a ''WORKING WITH FARR COMPANY'' personnel manual. This manual serves a very important function as it answers many questions relating to your company, your job, your benefits, your rights and your responsibilities as a Farr employee.
>
> Although this manual was prepared to offer a broad overview of many, many topics, a more detailed notebook is available in the breakrooms outlining the specifics of our employee personnel policies. These books are updated as policies are created or changed and will always be your most current source of information regarding personnel policies. New policies and/or changes are also posted on the bulletin boards for a period of time to alert you to any additions or changes to the notebook.
>
> Please find time during your break or lunch periods to browse through these notebooks so you too will be familiar with the policies that directly affect your.
>
> If you have any questions, please contact your supervisor or the personnel department.

Hired March 9, 1988, Fabricator Ronald G. Green was called by the General Counsel during the rebuttal stage (12:2463–2464). Green testified that Personnel Manager Pickney, conducting the new-hire orientation, went through the Farr handbook and explained some of the items such as insurance. However, Pickney did not tell Green (the only attendee) that rule 41 on page 20 had been modified or that ''Company time'' had been changed to ''working time'' (12:2464–2465, 2472, 2490). As Green explained on redirect and recross examination, he is certain Pickney said nothing about it, but not 100 percent certain (12:2508, 2512–2513). During the orientation tour Pickney showed Green the policy notebook in the breakroom and told Green it was kept there for employees to inspect during breaks and lunch (12:2492). As Farr observes (Br. 67), Green concedes he read the amended rule in the policy notebook and thereafter knew he was not to solicit during working time (12:2506, 2508).

For a week or two in about June 1989 Green, who on occasion reads parts of the policy notebook, did not notice the notebook in its usual position on the table in the breakroom. On seeing the notebook there again after its absence, Green observed to a fellow employee that someone must have returned the notebook (12:2474–2476, 2482, 2485, 2487). Green concedes the notebook could have been in a rack in the breakroom during that time (12:2481, 2486–2487). Pickney admits that he replaced the Hi-Bay breakrooms' policy manual in the summer of 1988 when it was reported as missing (9:1624–1625).

Cross-examination demonstrated that Green could not remember a lot of what was said or done during the approximately 1-hour orientation and tour. Green admits he cannot recall everything or even the types of papers he signed (12:2494, 2501, 2504–2505). That deficiency, while logically related to credibility, has little practical significance. It would be a rare employee who, some 21 months later, could describe everything said and done in an hour-long new-hire orientation. Finding such a witness is likely to occur about as frequently as sighting a unicorn during an Arkansas deer hunt. Nevertheless, in resolving credibility I weigh the fact that there are many aspects of his orientation that Green is unable to recall.

Two other items are of more significance than Green's orientation recall because they bear on his possible bias. First, Green apparently received a warning at one point. The Union filed a charge over the warning, but later the Union filed an amended charge which deleted that allegation (12:2477–2479). Second, Green was active for the Union, and in the days before the May 1989 election he wore an IUE T-shirt and an IUE cap. He acknowledges that he was (and presumably remains) a strong supporter of the Union (12:2479–2480). Balanced against those factors, however, is the fact that Green currently is an employee of Respondent Farr. By testifying against the interests of Farr, on a matter affecting all employees rather than some case personal to him, Green braves the risk of incurring Farr's ill will.

I credit Ronald G. Green. Testifying with apparent sincerity and exhibiting no bias, Green displayed a favorable demeanor. Although Green could not recall several significant details of the orientation interview, he remembered the general course, and he was clear enough on the point in question. However, I find the General Counsel did not establish that Hi-Bay's policy notebook was missing for some 10 days in about June 1989. Green did not look for the notebook, and simply did not see it on the table—but admits it could have been in the rack.

b. *Analysis*

Having found that Pickney on one occasion failed to alert a newly hired employee to the September 1987 modification of rule 41, it seems reasonable to infer, as I do, that Pickney on at least a few other occasions, likewise failed to do so. Although Ronald Green is industrious enough to read some of the rather bulky[12] policy notebook, other employees may not be. For them the earlier, and still published, employee handbook is what they know about rule 41. And for all the evidence concerning the presence of the modified rule in the policy notebook, the modified rule on page 3 there (the December 8, 1987 set of personnel rules, G.C. Exh. 48) is simply one of many unnumbered rules the listing of which begins mid-way on page 2. The rules seem to blur and merge as one reads down the list. With no numbers marking each rule, a reader's eyes tend to cross before reaching the modified solicitation rule two-thirds the way down page 3.

In any event, separate maintenance of the original version in the April 1986 employee booklet, or handbook (G.C. Exh. 5), erroneously categorizes ''Company time'' and ''working time'' as synonyms. Even if every employee at Farr is aware of both versions, the result is legal confusion of the two very different terms. Thus, I find unlawful (as alleged in complaint par. 15) Farr's maintenance of the original version in

[12] As it appeared on the counsel table (1:60). Green describes the notebook as having more than 10 pages, but he does not know if it has as many as 50 pages (12:2507).

the employee handbook. Farr's limitations defense is without merit.

It would be a relatively simple matter for Farr to apply adhesive-backed versions of modified rule 41 to page 20 of the employee handbooks it distributes, and to issue such sticker inserts to each current employee. Alternatively, Farr must republish its handbook with a no-solicitation rule which is not unlawful. See paragraph 2(b) of the Board's order in *Brunswick Corp*., 282 NLRB 794, 795 (1987).

5. Supervisor Larry F. Green

a. *Facts*

(1) February–March 1989 interrogations

Complaint paragraph 8(c) alleges that in about February 1989 Supervisor Larry F. Green unlawfully interrogated Farr's employees.

Larry F. Green has been fabrication supervisor over the sheet metal department since April 1986 (10:1919). Shortly after Green made supervisor, Farr hired Ricky G. Fletcher. A leadman under Green during the relevant period, Fletcher testified he has worked for Green from Fletcher's first day at Farr (6:1018–1019). An A class fabricator, Ricky Story is one of 14 or 15 employees working under Green's supervision (6:1039, 1062, 1064–1065). Fletcher never became involved in union activities, such as handbilling, and never wore any union caps, buttons, or insignia (6:1024–1025). By contrast, Story occasionally wore a union hat and openly supported the IUE (6:1043–1044).

The parties stipulated that the IUE filed the petition in Case 26–RC–7135 on March 15, 1989 (G.C. Exh. 2, item 2). About a month earlier, or about February 15, Story testified, Supervisor Green approached him at the end of the day as Story was lining up at the timeclock to punch out. Commenting that they both were now off work, Green asked Story what he thought about ''this union thing.'' Story said he did not know but thought it ''might be a pretty good deal.'' Apparently this occurred before Story began to support the IUE openly. Responding that Farr was ''no sweat shop'' and did not need a union, Green turned and walked away (6:1039–1040, 1060–1061). Testifying that he had received instructions from Personnel Manager Pickney concerning not interrogating employees (10:1924–1925), Green generally denies asking any employees how they felt about the Union (saying most employees openly expressed their opinions), claims he never initiated union conversations with employees (but asserts employees have raised the topic with him), and specifically denies asking Story his thoughts about the union (10:1922, 1924).

A second conversation, Story testified, occurred before the March 15 petition (roughly, therefore, about March 1). On this occasion Story, Fletcher, and Green were standing by Green's desk on the shop floor. Green asked them how many employees they thought were for the Union and how many employees had signed cards. The two told Green ''just about everybody.'' (6:1040–1041, 1059.) Indeed, all but four employees had signed cards, Story testified, and he acknowledges that the ''just about everybody'' response was truthful (6:1059–1060). Green does not specifically deny this account. Fletcher does not describe this conversation, although he asserts that on several occasions he and Green discussed the Union, with Green sometimes raising the subject and sometimes Fletcher doing so (6:1020).

On one occasion in late March to early April 1989 (or about March 31), Fletcher testified, just he and Green were present at Green's desk and Fletcher's table when they both began talking about the union subject. Green asked how many department employees Fletcher thought were for the IUE. The majority were, Fletcher answered. Green did not ask for any names. Fletcher asserts that his answer was truthful. (6:1019–1022, 1027–1028, 1032.)

(2) March 29, 1989 interrogations

Complaint paragraphs 8(d) and 8(e) pertain to events on March 29, 1989. Paragraph 8(d) alleges that on this date, on two ''separate'' occasions, Supervisor Green unlawfully interrogated employees concerning their union activities or sympathies. Paragraph 8(e) alleges that on such date Green interrogated employees concerning another employee's union activities.

Fletcher testified that on a day in late March or April when there was handbilling, Supervisor Green came in and asked whether Fletcher had seen Don Corter outside handbilling. A bit twisted, Fletcher's answer apparently is to the effect that he did not see Corter outside, but as Fletcher had arrived late, Corter could have been handbilling, stopped, and come inside before Fletcher arrived (6:1023–1024, 1033–1034). On cross-examination Fletcher acknowledges that Green also asked Scott Akers, who walked up as Green and Fletcher completed their exchange, whether Akers had been outside (handbilling) (6:1034–1035).

Former employee Scott Akers was a B class fabricator under Green until quitting about Friday, April 28, 1989, the week before the May 4 election (5:885, 890–892). Akers confirms that, on that occasion, when he came to get some rags to begin work, Green, in the presence of Fletcher, asked Akers whether he had been outside passing out handbills. ''No, I don't normally get here early enough to see anyone anyway,'' Akers replied before going to work (5:885–888). Fletcher testified that although Green made his inquiry of Akers in a laughing manner, Green was serious when he asked Fletcher about Corter (6:1034–1035). Don Corter also worked in Green's department (6:1035; 10:1920).

Until his last week at Farr, Akers showed no support for the IUE,[13] but in his last week there he openly supported the Union (5:888, 892–893). Akers gave two affidavits, one (April 13, 1989) before he quit and one (May 24, 1989) after leaving (5:889–890). The handbilling incident is described in his first affidavit (5:896). In his second affidavit Akers states (5:895), ''No company official ever spoke to me about the union prior to my having quit.'' As Akers explains, he meant that no one asked him about the Union as he was quitting, and that it does not relate to the handbilling episode. Crediting Akers, I agree with the General Counsel (Br. 75 fn. 55) that the quoted disclaimer is not inconsistent with his testimony.

A third conversation Story describes is tied to this handbilling. Although Story estimates that the date was before the March 15 petition, or before the election, because

[13] Supervisor Green testified that in 1987 or 1988, or ''considerably'' before the May 1989 election, he heard Akers tell another employee that he did not feel a union was needed at Farr (10:1922–1923, 1929–1930).

the IUE supporters were still trying to get cards signed (6:1041–1043), the General Counsel contends the date is March 29 based on the testimony of A class welder Ray F. Smith. Smith testified that he and other IUE supporters handbilled at the plant on March 29, 1989. On that occasion nonsupervisory (5:792, 879) employee Lonnie Rose spun his vehicle and almost hit Smith. Among those on the picket line then was Don Corter, Smith testified (6:791–793). Akers testified that the day Green asked whether he had been outside handbilling is the day Lonnie Rose swerved his car and almost hit Ray Smith (5:886). Thus, the evidence prima facie shows that these conversations are tied to the same date—March 29, 1989.

Story testified that in his third conversation with Green in which the union was mentioned, Green, when Story arrived at work, asked whether Story had been outside handbilling. No, replied Story. Green said he thought Don Corter had been. Responding to Green that he did not know who was outside, Story acknowledges on cross-examination that his protestation of ignorance to Green was true[14] (6:1041–1042, 1061).

Admitting that perhaps once or twice he observed employees at the employee entrance (handbilling, apparently) as he drove by the employee entrance (he normally entered another way),[15] Green denies ever talking with anyone about Don Corter handbilling outside. According to Green, probably the best way to ascertain whether anyone was handbilling would have been to walk out and look. Green specifically denies asking Akers or Story whether either had been handbilling. Although admitting he jokes with the three ''all the time,'' he does not recall asking any employee about handbilling in a joking manner (10:1920–1922). He admits that if employees stopped handbilling before he arrived and he heard about it, and wanted to find out who had been handbilling, he would have to ask (10:1931).

b. *Conclusions*

The employees each testified with a persuasive demeanor, and I credit them. I do not believe supervisor Green. Aside from some difficulty placing exact dates, the employees testified with specificity and with convincing details. Even if I credit the employees, Farr contends, the incidents are isolated and are not shown to be part of a concerted effort to obtain information on union organizing or to inject fear into the campaign. Farr argues for dismissal of the allegations (Br. 189).

Arguing for violation findings, the General Counsel relies on *Rood Industries*, 278 NLRB 160, 161–162, and *Raytheon Co.*, 279 NLRB 245, 245–246 (1986) (Br. 75). In *Rood* an interrogation by a foreman focused on who was ''talking union.'' The Board found the question suggested that the company had punishment in mind. A question by the company president, in the president's office, of how the union organizing campaign was going was found coercive. In a close issue, questions by the quality control manager in *Raytheon* were found unlawful despite a ''very loose'' conversation, characterized by laughing and joking, because he sought ''particularized'' information by persistent probing.

In our case Supervisor Green, about February 15, 1989, asked Story for his thoughts about the IUE. When Story, who apparently had not yet openly shown his support for the Union, voiced a favorable opinion, Green responded with his own negative opinion and abruptly walked away. Employees less courageous than Story might well be intimidated by such an event on the assumption that Green's negative opinion and abrupt departure would forecast future reprisals for union supporters. I find that Green's February 15, 1989 interrogation would reasonably tend to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights, and therefore violated Section 8(a)(1) of the Act as alleged in complaint paragraph 8(c).

The March 1 and 31 interrogations of Fletcher and Story (March 1) and then Fletcher (March 31) respecting their estimates of the number (but not identities) of card signers in Green's department is a much closer issue. Clearly Farr, through Green (and possibly all department supervisors), wanted to ascertain the IUE's support for any second election. As Green's leadman, Fletcher worked closely with Green and was on friendly terms with him. Story likewise appears to have been on friendly terms with Green. The conversations, although at Green's desk, were on the shop floor. Fletcher and Story answered truthfully. Although Green did not describe the purpose for his question, the purpose is self-evident. And even though Green gave no assurance there would be no reprisals, I find the circumstances were not coercive. I therefore find that Green's March 1 and 31, 1989 questions were not unlawful. As complaint paragraph 8(c) covers my finding respecting the February 15 interrogation of Story as well as the March 1 and 15 dates, there is no allegation to be dismissed.

Respecting the March 29, 1989 allegations, I note that Green's questions focused on identifying whether employees Akers and Corter were supporting the Union. Akers had not yet shown any support for the IUE, and the record does not reflect whether Don Corter had made public his sentiments. Even though the handbilling was an event conducted openly, I find that Green's questions would reasonably tend to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. Thus, I find the March 29, 1989 interrogations about handbilling violated Section 8(a)(1) of the Act as alleged in complaint paragraphs 8(d) and (e).

6. Supervisor Comer C. Reynolds

a. *April 27, 1989 police/towing threat*

(1) Evidence

Complaint paragraph 8(f) alleges that Farr violated Section 8(a)(1) of the Act in late April 1989 when Comer C. Reynolds threatened to call the police and have an employee's vehicle towed if the employee again parked on the driveway leading to Farr's employee parking lot. Bobby R. Kirby testified in support of this allegation.

About a week before the May 4, 1989 election (or about April 27), Kirby testified, he parked his red pickup on the Farr's access road to the Company's employee parking lot. Kirby testified that he parked his vehicle near the gate to the parking lot and that he did not block traffic (6:1090). Kirby

[14] Although the acknowledgement of a truthful response ostensibly appears in an offer of proof by Farr, my ruling which prompted offers of proof in this area by Farr was that Farr could not ask whether the witness felt threatened or in fear or placed in fear by Green's questions (6:1028–1030, 1032). Questions about the truth of answers were not excluded.

[15] Story testified that Green parks in the front lot (6:1065).

left his vehicle parked there about an hour (7:1189). He does not describe his purpose in parking there. Comer C. Reynolds was Kirby's supervisor (12:2372). Kirby testified that Reynolds later came to him at work and, after inquiring whether the truck was Kirby's, said that if Kirby ever parked there again he would call the police and have it towed. Kirby said yes, sir, that it would not happen again (6:1091). For months before this occasion Kirby openly had been wearing union insignia (6:1093).

Denying that he threatened to call the police and to have Kirby's vehicle towed, Reynolds' version is that he merely asked Kirby not to park his truck there but to park it on the employee parking lot as everyone else does. Kirby said okay, that he would comply (12:2373). Reynolds explains that employees are not to park on the access road, that a parked vehicle would obstruct traffic if other vehicles were going in both directions, that in the summer of 1988 he asked Matt Moore (who wore no union insignia) to park within the parking lot's designated lines rather than at the edge of the parking lot, and that a few days before the May election he told his leadman to ask Ray Smith to park his vehicle inside the parking lot rather than outside on the access road (12:2371, 2375–2378, 2395). Reynolds testified that when he drove in about 6 o'clock that morning (April 27) he observed Kirby, Ray Smith, and some other employees standing a few feet onto Farr's property and about 40 to 50 feet from Kirby's vehicle. He did not see anyone handbilling at the street entrance (which is some 60 to 70 feet from the gate to the parking lot), although on other occasions he had seen handbilling out there (12:2368–2371, 2393–2394).

When he arrived before work the morning of the May 4 election, Kirby testified, employees were distributing handbills both for and against the Union. Kirby observe a vehicle parked on the access road at about the spot he had been parked a week earlier. Kirby does not know whose vehicle it was. He is confident it did not belong to a union supporter because he had told them not to park there. He does not know whether anyone notified Farr's management about the vehicle's presence, nor does he know how long the car was there after the 45 to 60 minutes that he handbilled (7:1185–1188, 1195).

(2) Conclusions

The basic factual dispute is over what Supervisor Reynolds said to Kirby. As to that, I credit Kirby whose demeanor was favorable, in contrast to that of Reynolds. Thus, I find that Reynolds did threaten to call the police and have Kirby's vehicle towed if Kirby ever again parked on the access road. Is that an unlawful threat?

Urging a violation finding, the General Counsel argues disparity of treatment. Disparity findings are not justified because the evidence fails to show company knowledge that on election day someone's vehicle was parked on the access road. The disparity I find, however, is in the character of Reynolds' statement to Kirby. Unlike his mild instructions to Matt Moore and (through the leadman) to Ray Smith, Reynolds threatened Kirby with police and towing. Moore's vehicle was actually on the parking lot (in the wrong area) rather than on the access road, and that lessens the relevance to some extent. Moore did not show any visible support for the IUE. At some point before the May 1989 election, Ray Smith openly showed his support for the Union by, among other activities, engaging in handbilling (5:780–781, 846–848). Indeed, Smith described a specific incident occurring on March 29, 1989, while he and others were handbilling (5:791–792). Thus, I find that Smith's open support predates the April 27 incident involving Kirby and Reynolds. In any event, Farr's officials, as I found earlier, learned that Smith supported the IUE even before Smith visibly showed that support.

Smith is a brother-in-law of Reynolds' wife (12:2378–2379). Reynolds and Smith apparently are not on the best of terms. Reynolds testified that their relationship has been marked by ''some problems.'' (12:2378) Thus, Reynolds' mild instructions (through the leadman) for union supporter Smith, in contrast to the police/towing threat Reynolds delivered to Kirby, is explained, I infer, on the basis of the normal desire to maintain peace in the family.

Based on these factors, I conclude that Supervisor Reynolds delivered his police/towing threat, rather than the normal mild instruction, because Kirby was an open supporter of the IUE. In such a disparity context, Reynolds' threat would have a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. Accordingly, I find that, as alleged in complaint paragraph 8(f), Farr violated Section 8(a)(1) of the Act by Supervisor Reynolds' threat.

b. *May 4, 1989 plant closing threat*

(1) Evidence

Complaint paragraph 14 alleges that Respondent Farr violated Section 8(a)(1) of the Act on May 4, 1989, when Supervisor Comer C. Reynolds ''threatened an employee with plant closure if its employees selected the Union as their bargaining representative.'' Robert E. Elrod testified in support.

At the time of his November 30, 1989 testimony, A class welder Robert E. Elrod had been working for Farr nearly 3 years. Comer Reynolds is Elrod's supervisor (5:970). Elrod testified that on the day of the May 4, 1989 election Comer Reynolds approached him at work and asked him about a conversation Elrod had held with Scot Akers, an employee of Farr who recently had left the Company. Reynolds inquired why Elrod would want the Union.[16] Because, Elrod replied, he felt Akers had been treated unfairly and that union representation would be to the employees' benefit. To Reynolds' question of whether he believed he had been treated fairly Elrod said yes, but that he nevertheless thought ''some type of representation and job security were needed.'' Reynolds responded that he felt if the Union came into Farr at Jonesboro ''that they wouldn't last in Jonesboro more than 2 or 3 months.'' Elrod made no reply because another employee walked up at that time and Reynolds left to help him (5:970–972).

Supervisor Reynolds denies having any such conversation with Elrod, denies ever having a conversation with Elrod about the Union, denies any related conversation with Scot Akers, asserts that Akers never worked for him, denies ever talking with Elrod or any employee about Farr closing, and asserts that a plant closing is not a matter he would have information on anyhow (12:2344–2346).

[16] Elrod became openly active for the Union in late 1988 (5:985). The complaint does not allege that the interrogation was unlawful.

Elrod acknowledges that he (or the IUE) filed a charge with NLRB Region 26 alleging that he was given two written warnings because of his union activities, that the charge was withdrawn after a complete investigation (stipulation) (5:990–993, 1010), and that he believes Comer Reynolds had conspired in one incident, involving employee Lonnie Rose (who apparently opposed the IUE), to set him up for discharge because of Elrod's support of the IUE (5:1004–1006). Respondent Farr argues that Elrod is biased against it and Comer Reynolds (5:1009) and that the incident is isolated and occurred in a ''friendly'' discussion (Br. 189). Favoring Elrod's credibility, the General Counsel observes that Elrod, a current employee, testified against his employer's interest (thereby risking retribution) (Br. 76).

(2) Conclusions

Welder Elrod testified with a favorable demeanor, whereas the demeanor of Supervisor Reynolds was unfavorable. I therefore credit Elrod. Despite Elrod's possible bias, he appeared to be a sincere and truthful witness.

Whether Supervisor Reynolds would receive notice before hourly employees of a decision by Farr's California headquarters is an irrelevant consideration. The point is that Reynolds' plant closing remark, even though phrased as his estimate of how long the plant would remain open (I find that the ''they'' refers to Farr and not to the IUE), would reasonably tend to lead an employee to believe that Supervisor Reynolds was expressing an estimate based on statements he had heard from Farr's management. That Reynolds may not have heard such from management, and perhaps was expressing his personal opinion, is immaterial for two reasons. First, the remarks reasonably suggest insider information. Second, even if Reynolds had labeled his remarks as his personal opinion they still would be unlawful. Threats of plant closing cannot be legitimated by expressing them as a talismanic ''personal opinion.'' Accordingly, I find that, as alleged in complaint paragraph 14, Respondent Farr violated Section 8(a)(1) of the Act.

E. *Allegations of 8(a)(3) Discrimination*

1. Bruce E. Carr

a. *Allegations*

The complaint alleges that Respondent Farr unlawfully discriminated against Bruce E. Carr on four occasions: *First*, in June 1988 when it failed to promote him to leadman (par. 11); *Second*, also in June 1988 when it failed to promote Carr to A class welder (also par. 11); *Third*, on August 24, 1988, when it issued him a written warning for dishonesty (par. 12a); and *Fourth*, on October 11, 1988, when it fired Carr (par. 12c). Admitting the factual allegations, Respondent Farr denies that it violated the Act. Motive, therefore, is the inquiry. As the evidence respecting motive is disputed, credibility resolutions are critical.

b. *Background*

(1) General

Earlier I outlined some of Carr's work history at Farr, and I described his activities in leading the employee effort to bring in the IUE. Carr's work history is briefly restated as follows.

Hired when the Jonesboro plant opened in April 1986 (R. Exhs. 10, 11; 1:83; 3:260), Carr worked about 2 weeks as a general helper in department 2-D until welding work started. He began welding on May 12 as a C class welder (1:84; 3:260). Carr was promoted to B class welder in July 1987, the position he held at the time of his discharge (1:83–84; 3:260–261). Starting in the main plant (department 2-D) at the time he was hired (4:447–448), Carr bid for one of two B class welder openings in Hi-Bay, posted November 24, 1987 (G.C. Exh. 23). He was successful and made his lateral transfer to Hi-Bay on December 7, 1987 (3:180, 271; 4:448) where he worked until his October 11, 1988 discharge (G.C. Exh. 11; R. Exh. 36).

(2) April 1986 to December 1987

Carr began work at Farr on April 23, 1986 (R. Exhs. 10, 11) subject to a 60-day probation period (G.C. Exh. 5 at 5). Farr uses written forms for employees evaluations, and on June 20, 1986, Supervisor Larry F. Green filled out Carr's initial evaluation (3:419), marking the ''probation appraisal'' box (G.C. Exh. 36). Based on attendance problems, Carr's probation period, at Green's recommendation, was extended to July 21, 1986 (3:419). (Attendance was not a factor in Carr's termination. Attendance and performance programs operate on separate tracks at Farr. 1:102, Pickney.)

Farr's appraisal form has eight categories with three box-choices for each category. Of the categories, one pertains to attendance and one to promptness. Five pertain to performance and the final one to getting along with others. The box terms vary by category, but roughly equal that listed for the quality category: Needs Improvement; Meets Standards; and Exceeds Standards. The eight categories are: Quantity of Production; Quality of Production; Knowledge of Work; Initiative; Safety & Housekeeping; Absence Record; Promptness; and Effect On Others. Each category has a space for an explanatory comment under the row of boxes.

The evidence is not well developed concerning this first evaluation. Recall that it was 2–4 weeks before there was any welding for Carr to do (1:83–84; 3:260). Moreover, Larry Green has always worked as the fabrication supervisor over the sheet metal department (10:1919–1920). If Green evaluated welding, he did not so testify, although this first appraisal form for Carr names the department as ''Welding-2D'' and the job as ''Welder C.'' The keys to this puzzle seem to lie in Comer Reynold's testimony that he sat in on this appraisal (12:2381). Although Reynolds, who was a welding supervisor at Farr's Crystal Lake, Illinois facility before coming to Jonesboro, asserts that he has always been a supervisor at Jonesboro (12:2323), Carr thinks Reynolds' capacity in the early weeks was that of a lead person (3:420). Regardless of his actual title at that time, it seems that Reynolds probably was the person supervising the welding even though Larry Green was the department supervisor.

What this summary leads up to is to observe that the box for Carr's production quantity is marked as satisfactory rather than ''Should Be Increased,'' but the accompanying comment states, ''Quantity could be better but is offset by good quality.'' Of the three quality boxes, the middle one—Meets Standards—is marked, with the comment, ''Quality is on high side of good. Is very conscientious of quality.'' Even

so, for the next category, work knowledge, similarly marked as satisfactory (''Has Required Knowledge''), Green (and Reynolds) comments, ''Has adequate knowledge of work but sometimes is too sure of himself. i.e.: Doesn't note detail.'' For the Initiative category the middle box (''Steady & Willing Worker'') is marked. Green commented, ''Needs some supervision due to an urge to talk too much. Has been cautioned about this and agreed to try harder.'' Skipping to the getting along category, I note that the middle box (''Fits In Satisfactorily'') is marked, and Green commented, ''Gets along well with others.'' Carr signed without adding any remark (there is no space for the employee to add a comment). Around this time Comer Reynolds, supervising the welding and paint departments in the main plant, became Carr's supervisor (12:2323, 2325).

Effective for July 21, 1986, Comer Reynolds' July 18 appraisal (G.C. Exh. 35) lifted Carr out of his probation period (3:425). Reynolds notes a major improvement in attendance. Production quantity improved slightly, but, Reynolds remarks, ''is still less than adequate. Must continue to improve.'' Quality is on the high side of good, knowledge is ''good,'' but initiative could improve (Reynolds' comment does not explain why and neither does the testimony). For his overall comments and recommendation, Reynolds states (G.C. Exh. 35):

> Bruce does a fine job of Tig welding which is a great benefit at this point of manufacturing. I recommend granting him seniority at this time.

Under handbook policy, ''seniority'' relates back to date of hire after completion of the probation period (G.C. Exh. 5 at 15).

The record is not clear respecting the sequence and dates of the shifts and Supervisors Carr had. In September 1986 Farr hired Larry Smith and appointed him as the night-shift supervisor, a position he held until January 1987 when he apparently became the day supervisor over the filter area and maintenance department. When he worked nights, Smith supervised the welders, including Bruce Carr (10:1901–1903). Apparently, therefore, about September 1986 Carr was transferred from Supervisor Comer Reynolds to Supervisor Larry Smith. Presumably that means Carr went from days with Reynolds to the existing, or newly established, evening shift.

As I earlier reported, in September–October 1986 Carr and some employees from departments 2-D and maintenance began discussing unions, and about mid to late October Carr contacted the IUE (3:261–262). About late November to early December 1986, as I have found, Larry Smith, Carr's supervisor, gave Carr a ''friendly'' warning that he needed to be careful because Farr had learned that Carr had contacted the IUE and was holding union meetings (3:261–262). Thus, the fact that Carr did not begin wearing IUE insignia openly until about June 1987 (3:268) is largely irrelevant because Farr already was well-informed about his union sentiments and activities.

Also largely irrelevant on the issue of knowledge is Pickney's testimony that he did not become aware of Bruce Carr's union activities until the November 1987 election when Carr served as a union observer. Actually, Pickney testified, ''I don't recall seeing any other union activity from Bruce Carr'' before the November 1987 election (1:86). Pickney arrived at Farr on March 30, 1987 (1:72). To the extent Pickney's credibility is relevant elsewhere, on this point I find that management informed Pickney shortly after his March 30, 1987 hire date that employees were holding union meetings and that Bruce Carr was prominent in that respect.

Recall, too, that in April, shortly after Pickney arrived at Farr, Carr's in-plant organizing committee became fully organized and began a card-signing drive (3:267, Carr). As Farr almost from the beginning knew of Carr's union activities, I find that it likewise learned almost immediately of the card signing efforts.

Initially at Jonesboro an employee, after completing his probation period, received performance appraisals every 6 months (8:1371, Pickney). Later, Farr discontinued the postprobation appraisals. (11:2133–2135, Bowman). Personnel Manager Pickney testified that employees receive automatic pay increases through four steps to the top rate of the grade (1:84–85). Carr's next, and third, appraisal was prepared by Larry Smith on January 14, 1987 (G.C. Exh. 34; 3:425–426). Supervisor Comer Reynolds testified that he had no part in the appraisal (12:2380–2381). Bruce Carr's signature appears without a date.

Larry Smith gave Carr what can be characterized as a ''good'' appraisal. For *quantity* Smith marked the middle box (''Does Satisfactory Day's Work'') without comment. However, Smith indirectly comments on quantity in making his comment about quality. Marking the middle *quality* box (''Meets Standards''), Smith wrote, ''Very much concerned about the quality of his work. Which may affect his production some.'' (The unnamed subject could cause a misreading. It is clear from the context that Smith meant that Carr was very much concerned about quality.) The middle box is unlike his marking of the other performance boxes, where Smith marked them in the center. Smith marked the quality box on the right. The boxes are aligned so that better performance is to the right and lesser performance is to the left.

The third category is *knowledge* of work. Failing to mark any of the boxes, Smith wrote: ''Bruce has a great deal of knowledge about welding, but as far as the jobs are concerned he has not been exposed to all of them.'' (3:426.) For the *initiative* category Smith marked the middle box (''Steady & Willing Worker'') and wrote, ''Always in welding booth & working.'' At the next category, *safety and housekeeping*, Smith marked the middle box (''Orderly & Careful; Follows Rules'') without comment. Smith gave good marks and comments at the attendance and promptness categories. The last category is ''Effect On Others.'' Smith marked the middle box (''Fits In Satisfactorily'') and wrote, ''Gets along ok with other employees.''

In the space provided for overall ''Comments/Recommendations,'' Smith wrote (G.C. Exh. 34):

> I recommend we expose Bruce to more of the welding jobs in order to make better use of his welding ability.

During his turn as a witness in this proceeding, Supervisor Smith was not asked about this appraisal, nor was Plant Superintendent Marvin Gardner who, it appears, initialed his approval on January 23, 1987.

At some point between his January 14, 1987 appraisal by Supervisor Larry Smith and his July 1987 appraisal by Comer Reynolds, Bruce Carr (presumably returning to the

day shift) resumed working for Supervisor Comer Reynolds, and on July 14, 1987, Reynolds signed the next evaluation (G.C. Exh. 33; 12:2331, 2381–2382). Marking all the middle performance boxes (but the left box for promptness, ''Often Late,'' commenting that Carr needs to improve), Reynolds commented as follows respecting the different categories. On *quantity* Reynolds wrote, ''Bruce has improved on his work in last 2 mo. Quantity is much better.'' Carr does ''good'' *quality* work, Reynolds wrote. As to *work knowledge* Reynolds wrote, ''He has some good knowledge of welding, and is working with drawing pretty good. He has improved here also.''

For *initiative* Reynolds wrote that Carr ''is always on the job in time. Does not need a lot of supervision now.'' The latter comment apparently means that Carr paid attention to his work and was a steady worker. On the *promptness* category Reynolds gave Carr poor marks (marking the ''Often Late'' box) because he ''Left early 4 times, Tardy 2 times, Needs to improve.'' Reynolds wrote that Carr did an ''average'' job of *housekeeping* and, respecting the *effect on others* category, declared that Carr ''works with other employees ok.''

Coming to the overall ''Comments/Recommendations'' section, Reynolds wrote (G.C. Exh. 33):

> Bruce has improved on his welding, also in the quality of his work. His production has been up in the last 2 mo.

Bruce Carr's signature on the document is dated ''10–5–87'' (4:680).

As the appraisal form reflects, Carr was a C class welder at the time of his July 1987 appraisal. Apparently based on the favorable appraisal by Reynolds, Carr was promoted to B class welder effective either July 10 (1:84, Pickney) or July 20 (1:83). Reynolds confirms the promotion (12:2329, 2332). Carr's rough estimate of September (3:429) seems off by 2 months. According to Reynolds, Carr improved his production before the July 1987 appraisal, but after obtaining the promotion to B class welder, Carr's production began to drop again (12:2329). Reynolds claims he told Carr to improve his production, but concedes he never gave Carr a written warning (12:2329–2330).

On November 24, 1987, Farr posted a notice of two B class welder vacancies in Hi-Bay (3:181; G.C. Exh. 23). Pickney concedes that several employees bid and, therefore, Plant Superintendent Gardner had to make a choice, selecting Bruce Carr and James ''Butch'' Kirksey on December 1 (3:181; G.C. Exh. 23). According to Pickney, he separately informed Carr and Kirksey that each would be tested in about 2 weeks on ''S & S'' specifications (Stewart and Stevenson, a substantial customer), and if they did not pass they would have to return to 2-D. If they passed they would remain in 4-H (Hi-Bay) as B class welders. Pickney testified that Kirksey rescinded his bid on learning the conditions (8:1540–1541). The record does not reflect whom Gardner selected next. The posted bid sheet says nothing about testing for S & S specifications nor that failure to pass a test would result in the successful bidder's being returned to his former position.

Carr relates a different story. He testified that he bid on a lateral transfer to Hi-Bay because of assurances he received from Supervisor Danny Tinch and Pickney. Danny Ray Tinch was promoted to welding supervisor on the day shift shortly after Hi-Bay opened (10:1841–1842). Before bidding on the Hi-Bay job, Carr asked Tinch about it and whether he would be able to move up to A class welder. Tinch answered that Carr would be given the A class test and if he passed he would be promoted (3:272). Asked if he had ever conversed with Carr about A class welding positions before they were actually posted, Tinch testified, ''I don't recall.'' (10:1893–1894.)

Carr testified he had essentially the same conversation with Pickney (3:273). Not explicity denying Carr's assertion, Pickney, as I summarized two paragraphs ago, describes a conversation with Carr that transferring to and remaining in Hi-Bay would be contingent on Carr's passing the ''S & S'' test (8:1540–1541).

I credit Carr. Aside from Carr's superior demeanor, Carr's testimony is specific. Tinch does not recall whether he had a conversation on the topic with Carr, and Pickney, who does not directly deny Carr's assertion, describes an ''S & S'' test. As we see in a moment, Carr—as Tinch told him—was able to take the A class test after he transferred to Hi-Bay. I reject Pickney's version and accept that of Carr.

Recall that the November 20, 1987 election had just been held in which Bruce Carr served as an observer for the IUE. Recall also that a week after the election Carr's supervisor, Comer Reynolds, asked Carr why he had to be so ''rebellious'' by continuing to wear his IUE sticker. Despite Carr's prominent position as a union supporter, Farr selected Carr for the lateral transfer to Hi-Bay. Comer Reynolds, Carr's supervisor in department 2-D in the main building, testified that ''they'' (presumably Marvin Gardner, Tinch, and possibly Pickney) came and asked Reynolds whether there would be any problem with Carr's transferring. Saying there was no problem so far as he could see, Reynolds admittedly gave them a favorable recommendation of Carr (12:2383–2384). Reynolds' testimony can be interpreted as including an inquiry whether a loss of Carr would disrupt the production in Reynolds' 2-D department. Even if that was part of the inquiry, I find that a question also was asked about Carr as a worker and that Reynolds, around December 1, 1987, favorably recommended Carr.

On December 7, 1987, Carr transferred to Hi-Bay on the day shift under the supervision of Danny Ray Tinch (4:448–450; 12:2552, Carr; 10:1842, Tinch). About 6 weeks later Carr's fortunes at Farr began to fall.

(3) January to May 1988

(a) *January 1988 evaluation*

On January 19, 1988, Farr gave Bruce Carr two items: his regular 6-month appraisal (G.C. Exh. 32) and a written warning for low production (G.C. Exh. 14). Carr received them at the same interview (3:433–434). Supervisors Danny Tinch (10:1843) and Comer Reynolds (12:2333) collaborated to produce and sign the joint evaluation with a single date of January 13, 1988, to the right of Reynolds' signature. Tinch testified that only he, and not Reynolds, was present with Carr to discuss the appraisal (10:1848). Marvin Gardner, the plant superintendent, initialed the evaluation on January 18 and Pickney signed the same day as shown by the form. Carr did not date his signature. The same persons (except for

Reynolds, who did not sign) dated their signatures on the warning as January 19.

The January 1988 appraisal is a substantial downgrade from what Carr had been receiving. Carr considers it a bad appraisal (3:431). On production *quantity* the first box (''Should Be Increased'') is marked with a comment that production is ''not satisfactory.'' The next two middle boxes are marked, with the *quality* comment being ''ok'' and Carr appraised in the comment on work *knowledge* as having the knowledge ''to do the job.''

On *initiative* the first box (''Wastes time. Needs Close Supervision'') is marked, with the comment being ''Not at work station at starting time.'' Reynolds disclaims any input on this category (12:2334), but Tinch says the evaluation for the category came from both of them (10:1846). Tinch testified that Carr wasted a lot of time at other work stations, returning to his own when Tinch admonished him. According to Tinch, this was a chronic problem with Carr (10:1846–1847).[17] Tinch and Reynolds marked the middle boxes for *safety and housekeeping*, *absence record*, and *promptness.*

The final category, *effect on others*, is marked at the first box, ''Does Not Work Well With Others,'' with the comment that Carr ''has had problems with othe[r] employee.'' On this category it is Tinch who disclaims, saying it came from Reynolds (10:1848). Tinch testified that Reynolds, without giving any details or reporting what it was about, said Carr had gotten into a big argument with Mel Hawkins (10:1887–1888). Carr drew an arrow from his signature to the comment about problems with an employee. Over the arrow Carr wrote, ''Do Not Agree,'' and asked Tinch for examples. Tinch could give none other than, ''Comer told me that you had problems with Mel Hawkins, because of the union.'' ''Yes,'' Carr replied, but that was no problem because Hawkins was on one side of the issue and he was on the other. Tinch did not respond. (3:274–275.)

For overall comments Tinch, who of the two actually filled out the form (10:1887; 12:2337), wrote that Carr ''must improve production & show more initiative.'' Tinch denies that any union activities by Carr influenced the appraisal (10:1850). On the two categories (*production* and *effect on others*) where Reynolds apparently specifically gave his own observations to Tinch, Reynolds asserts that Carr's union activities had nothing to do with the evaluation (12:2333, 2395).

According to Supervisor Reynolds, on one occasion in the last half of 1987 he observed maintenance employee Mel Hawkins walk over to Carr's work station and exchange ''words'' with Carr. Reynolds walked over to the two because, he suggests, the ''words'' were rather disputatious. Either there or later (when is unclear) Hawkins supposedly told Reynolds that Carr had called him over and there was a problem. Although he spoke to each one afterwards, Reynolds supposedly never got the full story. He does not recall what Carr told him. Reynolds asked them not to let it happen again. That single incident, Reynolds concedes, was the basis for his evaluation on this category, and he so told supervisor Tinch (12:2334–2337). At the time Reynolds had heard through the ''grapevine'' that Hawkins was antiunion (12:2387). Reynolds was aware that Carr had begun wearing IUE insignia before the November 1987 election and is not aware that he ever stopped wearing it (12:2387–2388).

Carr testified that there was one occasion in the fall of 1987, before the November election and during the card signing, when he and Mel Hawkins exchanged unpleasant words. The incident occurred near the water fountain. Reynolds and Hawkins were standing there and Carr walked up and told Reynolds he needed to talk with him about a welding problem. Hawkins (who did not testify) interjected with, ''Bruce, why don't you get Comer to sign one of your union cards. I hear he hasn't signed one yet.'' Carr replied that Reynolds could see him at lunch if he wanted to sign, that Carr did not think this was the time or place, an that he simply had asked to see Reynolds about a work problem. Carr then turned and walked away (12:2542–2545). Although Carr does not specifically deny the incident description given by Reynolds, he does so by implication in that his account is of the one occasion that he and Hawkins had an exchange of ''unpleasantries.'' (12:2542.) As Carr told Supervisor Tinch in the January 1988 evaluation interview, Carr and Hawkins were on opposite sides of the union matter (3:275).

As Carr testified with a more persuasive demeanor than Reynolds, I credit Carr's version of the Hawkins incident. Even if I accepted Reynolds' version, I would find his evaluation on this point tainted by antiunion animus if disparity were shown. By his own account, Reynolds gave Carr a bad mark even though it was Hawkins, whom Reynolds had heard was antiunion, had entered the work station of Carr. However, the record does not expressly show whether Reynolds gave an equally bad rating to Hawkins for the latter's appraisal. I would infer that he did not, but there appears to be no basis for such an inference other than Farr's failure to offer the corresponding evaluation form for Hawkins. Thus, disparity is not shown under the Reynolds version.

On the credited account of Carr, unlawful motivation by Reynolds is shown. Carr simply responded, in the presence of Reynolds, to Hawkins' question about union cards. Carr's response, appropriate by any standard, was protected. Regardless of whether Reynolds gave Hawkins a poor evaluation on this point, Reynolds could not punish Carr for his protected response. Thus, I find that the evaluation of Tinch and Reynolds on this getting-along-with-others category is tainted by an unlawful motive and that it is evidence of a plan to discriminate against Bruce Carr because of his activities on behalf of the IUE. Because the incident occurred outside the statutory 6-month limitations period, the General Counsel therefore seeks no unfair labor practice finding (Br. 44). There is no complaint allegation covering the incident. Making no finding of a violation of the Act, I nevertheless find, as expressed, that it is evidence Farr had decided to get rid of Bruce Carr because of his support of the IUE.[18] Whether Farr's motivation was to punish Carr now that the election was safely over, or to get rid of him before he

[17] Initially Tinch testified Carr was ''always'' out of his work station (10:1847, 1882). Tinch subsequently modified that to ''a lot of times,'' specifying he spoke twice with Carr about the matter (10:1882–1884).

[18] At one point Carr answered that his January 19, 1988 evaluation was before he resumed wearing his IUE helmet (3:431). More specific testimony by Carr shows he still was wearing the old IUE sticker at that appraisal and discontinued it about late January to early February 1988 (3:268–271; 4:679–680). As I summarized earlier under the topic for Case 26–RC–7135, around May 11 or 12, 1988, Carr painted ''IUE'' on his hard hat after unsuccessfully seeking an upgrade to A class welder based on passing the A test in February 1988.

drummed up support for a new election, or both, I need not decide.

Respecting the poor rating on production, I shall defer discussion of that until the next subdivision where I discuss the warning Farr gave Carr that date for low production. On the poor *initiative* rating (needs close supervision because out of his work station), Supervisor Tinch, after initially testifying Carr was out of his work station ''always'' (10:1847), then ''a lot of times'' (12:1884), eventually testified that he spoke with Carr about it twice (12:1883, 1884). Other than a brief allusion to the item on cross-examination (3:431), Carr is not asked his version of the matter. However, early in his testimony Carr testified that Tinch never complained to him about his work or ''anything.'' (3:276.) Noting the dispute between Tinch and Reynolds over whether Reynolds specifically contributed to this topic, Tinch's exaggerated stretching of the instances to an initial ''always,'' Carr's denial that Tinch ever complained to him about anything, and the fact I observed Supervisor Danny Ray Tinch's demeanor to be unsatisfactory, I severely discount the *initiative* rating. To the extent the poor rating is based on any instances at all, I find that Tinch, exaggerating a possible brief tardiness by Carr in reaching his station at one or more starting times, used such minor events as a pretext for giving Carr a poor rating on the *initiative* category—all because of Carr's steadfast support of the IUE. I turn now to the production rating and warning.

(b) *January 1988 warning*

As expressed in the text of the Company's statement on Farr's January 19, 1988 written warning for low production delivered by Supervisor Tinch to Bruce Carr, the stated basis is (G.C. Exh. 14):

> Bruce was transferred, at his request, to the Hi-Bay Department on 12–7–87. Since that time, his production has steadily decreased, rather than increase. Bruce has the ability to produce in a satisfactorily manner but is not doing so at this time. His production must improve for him to continue his employment at Farr Company.

For his part, Carr checked a box on the form that he disagreed, writing that he did not feel that his production had decreased. The express ''warning decision'' states:

> This is a 1st written warning because of sub-standard production. Continued neglect of production will result in a final written warning.

Supervisor Tinch testified he issued the warning to Bruce Carr, to speed up his production, only after unsuccessfully telling him to increase his production speed (10:1845–1846, 1878). Denying that Tinch ever mentioned a production problem or said he had to speed up, Carr testified that in fact Tinch told him he thought Carr was progressing (3:275–276; 4:450). Indeed, when Tinch gave him the warning, Carr testified, Carr told Tinch he disagreed and asked Tinch to cite some examples but Tinch declined (3:274).

According to Tinch, from his visual observation of Carr's work he concluded Carr needed to speed up his production. For example, Tinch testified, Carr was taking twice as long as other welders on 20L bin vents and spark traps (10:1845, 1884). Production records, and a recap prepared for the trial, confirm the time difference on the 20L bin vents (R. Exh. 80; 8:1505; 9:1684). The parties stipulated that the recaps were prepared for this trial (9:1685). The other items in the exhibit (R. Exh. 80) are labor cards filled out by the worker and a computer printout showing the closed production orders. Supervisor Tinch at one point gave the specific hours—66—which it took Carr to weld the 20L bin vents, compared with an average of about 30 (10:1845). He concedes that he relies on the computer run for the specific hours and the computer run is not even available until about 2 weeks after the orders are completed (10:1885). Tinch then states he looked at the records (10:1886). Tinch seems to imply that he did so before preparing the warning.

In any event, the 20L bin vent records introduced by Respondent on this point cover, as to Carr, the period of December 7 through 21, 1987 (R. Exh. 80; 8:1508, Pickney). As Pickney concedes (9:1683–1684), that period covers Carr's *first* 2 weeks in Hi-Bay. For this period Farr contrasts Carr's 66.4 hours with A class welders Ray Smith, Marion ''Gene'' (8:1507) Haner, Richard Witt, and Ricky Tinch (9:1688–1689), and B class welder James ''Butch'' Kirksey (9:1689). Although their times are around 30 hours, Smith, for example, welded the 20L bin vents in 2-D, the main building from where Carr had just transferred (12:2561). While Carr had never previously worked on the 20Ls, that was his first assignment in 4-H, or Hi-Bay (12:2528, 2561). Although 20Ls are simply twice as large as 10Ls, Carr does not recall welding any 10Ls in 2-D (12:2561). The products in Hi-Bay are much larger than those Carr worked on in 2-D (3:276, 434; 4:448). Some aspects of the work in Hi-Bay made the work more difficult there, and Carr acknowledges that it took him awhile to get the ''hang'' of the work in Hi-Bay (4:448).

Tinch cited ''spark traps'' along with the 20Ls (10:1845). Carr testified that he recalls working on sparks traps in about the summer of 1988, and not during the time frame of this warning (12:2542). Carr's version is supported by Tinch and Pickney. Tinch identified a June 9, 1988 memo (R. Exh. 94) by Tinch comparing the June 8–10 work on ''spark traps'' by Bruce Carr and Roy Cline (10:1860). Pickney identified a recap and labor cards (R. Exh. 81) showing that Carr and Cline worked on a certain item number over June 8–10, 1988 (8:1515–1516). Later, Pickney explained that the items are spark traps which are a component of the spark arrester (10:1832).

Through Personal Manager Pickney, Respondent introduced a set of pages for ''outlet tees'' (R. Exh. 82). As the recap reflects, Carr's work on the units is shown for the period of December 29, 1987, to January 8, 1988. In that period Carr welded 50 units in 37.0 hours. For comparison, S. Tilley and D. Jacks welded 47 units in 25.7 hours from February 20 to 25, 1988 (R. Exh. 82), with Tilley working 4 days and Jacks 1 day (8:1522). The outlet tees have part numbers and order numbers which, as Farr's own exhibits (R. Exhs. 81, 82) reflect, differ from those of the spark traps. The ''outlet tee'' is shown on a blueprint copy (R. Exh. 82-2) as part of a ''spark arrester.'' Pickney simply says the outlet tee is part of a spark arrester (8:1517). The exhibit was not shown to Tinch. It therefore appears that spark traps and outlet tees are different components used in spark arresters.

Shown the outlet tees exhibit (R. Exh. 82), Carr testified that he worked on the outlet tees and that he was delayed

by bad parts and having to swap them around, trying to find a fit, after Tinch said to use them (12:2528–2531). Although Carr does not claim to know that such caused all of the extra time, he knows it caused ''a problem.'' (12:2563.) Tinch was not called to rebut Carr's testimony. Crediting Carr, who testified with a sincere demeanor, I find that Tinch was well aware of the problem Carr described respecting the outlet tees. Indeed, Tinch refers to spark traps, not outlet tees. Regardless of the cause of that confusion, I find that Farr was aware of the parts problem experienced by Carr, and knew that 37.0 hours shown for Carr was inflated. Farr's reliance on the figure reflects, I find, Farr's animus against Carr over his IUE activities. Particularly is this so when Tinch himself did not rely on it and makes no claim that the outlet tees job was part of Carr's ''low'' production.

Identifying no specific units of Carr's work, Supervisor Reynolds is content simply to generalize that he had observed Carr to be ''slow.'' Asked to explain, Reynolds asserted that Carr seemed to have problems placing parts in fixtures and welding them, whereas other welders would just ''pick up the job, they'd just do it and go on and no problems.'' (12:2328). Apparently assigning this criticism to all the time Carr worked for him, Reynolds follows by confirming, as earlier summarized, that he had recommended (July 1987) Carr's promotion to B class welder. Reynolds asserts, however, that Carr had improved his production for a short time before that, only to let it drop after his (July 1987) promotion to B class (12:2327–2329). Claiming he [thereafter apparently] told Carr he had to increase his production (12:2329–2330), Reynolds concedes that, when Carr bid in late November 1987 on a transfer to Hi-Bay, Reynolds gave a favorable recommendation on Carr to those concerned (12:2383–2384). The ''concerned'' presumably were Danny Ray Tinch, the first-shift welding supervisor at Hi-Bay, Marvin L. Gardner, the plant superintendent, and possibly Darrell D. Pickney, the personnel manager.

Reynolds' description of Carr's supposedly slow work flows from his testimony about his recommendation to Marvin Gardner, the plant superintendent, on the leadman position. Reynolds recommended James Chapman over Carr and Dewayne Jacks in June 1988. To confirm his opinion of Carr as a slow producer, Reynolds claims he checked past production records reports (presumably the computer runs on closed out orders), but he could not recall which ones (12:2328, 2380). No such reports were produced or identified and Respondent offered no such records. The General Counsel requests that I draw an adverse inference from Farr's failure to introduce such ''closed out'' computer reports (Br. 46).

Granting the General Counsel's request, I draw the inference that if Farr had produced the records they would not have supported Reynolds' testimony that Carr was a slow worker, a low producer. The July 18, 1986 appraisal prepared by Reynolds classifies Carr as ''satisfactory'' on production (G.C. Exh. 35). In the comment space Reynolds states that Carr's quantity is less than adequate and must ''continue'' to improve. That comment does not equate to a statement that Carr is a slow worker in the sense of being less than satisfactory. ''A'' class welder Ray F. Smith offers pertinent insight when he explains the difference between ''quality'' welders and ''production'' welders (5:835, 842–843). The one emphasizes quality while the other stresses quantity. Production welders are called ''fast'' welders, and quality welders are called ''slow'' welders (5:835).

Reynolds once remarked to Smith that Carr was good but slow. However, as Smith explains, ''you can't ever get fast enough for Comer—I'll put it that way.'' (5:843) Although Farr tells its welders it wants a quality weld in order to sell its products (5:842–843), Smith testified that Supervisor Reynolds, more production oriented when a welder himself, is more interested in production (quantity) than in quality—even to the point of approving unsatisfactory quality at times (5:843–844). As authors L. Koellhoffer, A. F. Manz, and E. G. Hornberger state in *Welding Processes and Practices* (1988) at 19 concerning the welding rate:

> ''Hurry, hurry, hurry.'' ''Get done as fast as you can!'' Speed in welding seems to be a battle cry in many shops. You should be aware that speed isn't always good.

Thus, as Reynolds used ''slow'' at the plant to describe Carr, I find he meant Carr's production quantity, although meeting Farr's satisfactory level, did not quite rise to Reynolds' desire that the quantity level always be higher than what the welder was producing. At the hearing, I find, Reynolds and Respondent Farr sought to apply the term ''slow'' to Carr in the adverse sense that Carr's production quantity was below Farr's level for satisfactory.

Because he adopted Farr's goal of a quality product, Carr had difficulty complying with the Company's quality standard while at the same time seeking to satisfy Reynolds' elevated quantity expectations. Even so, when Reynolds evaluated Carr on July 14, 1987 (G.C. Exh. 33), we see that Carr's quantity, according to Reynolds himself, not only was ''satisfactory,'' but had improved and was ''much better.'' Indeed, other than giving Carr a poor mark on attendance (for leaving early four times and tardy twice), Reynolds had only praise for Bruce Carr. Offering no closed orders computer runs or other documents in support of his testimonial disparagement of Bruce Carr's work following Carr's July 1987 promotion to B class, Supervisor Reynolds claims that Carr's quantity began to drop after that promotion and that he unsuccessfully admonished Carr to increase his production (12:2329–2330). I do not believe Reynolds.

Recalling my earlier findings that Supervisor Reynolds, about a week after the November 1987 election, asked Carr why he had to be so ''rebellious'' in continuing to wear the IUE sticker, his April 27, 1989 police/towing threat to Bobby R. Kirby, his May 4, 1989 plant closing threat to Robert E. Elrod, and Reynolds' poor demeanor, I have no trouble finding that supervisor Comer C. Reynolds testified falsely that Bruce Carr had low production. Reynolds did so, I find, to conceal Farr's true motive in having Reynolds give false testimony—to provide the false pretext needed for adverse actions against Bruce Carr because of his support of the IUE. In short, I find the January 19, 1988 written warning to Bruce Carr for low production to be tainted by Respondent Farr's unlawful motivation. Only Section 10(b) of the Act, the limitations period, saves Farr from an unfair labor practice finding on the matter.

The mid-January 1988 appraisal and warning issued to Bruce Carr, tainted by Respondent Farr's antiunion motivation, reflect Farr's antiunion animus. Although the incidents

are time-barred by the 6-month limitations period of 29 U.S.C. § 160(b), the animus they reflect may be used to shed light on and give meaning to events within the limitations period. *Machinists Local 1424 (Bryan Mfg.) v. NLRB*, 362 U.S. 411 (1960); *Storer Communications*, 295 NLRB 72 fn. 3 (1989). When Respondent Farr objected at the hearing on the basis of Section 10(b), the General Counsel announced that the Government is not seeking a remedial order respecting these incidents (3:276–278).[19] It is clear from Storer, id., and similar cases that a remedial order is not available. (Of course, the General Counsel quite properly does not allege the incidents as unfair labor practices.)

Unfortunately, elsewhere the General Counsel does seek virtually the same remedy when he requests that the January 1988 appraisal be disregarded (Br. 49) respecting the leadman promotion, and impliedly makes the same request on the January 1988 warning respecting the selection for welder A promotion (Br. 52). The January 1988 appraisal and warning—though their circumstances can be used to show animus—remain in effect, and available to Farr, because they issued outside the limitations period. *Storer*, id.; *Commercial Cartage Co*., 273 NLRB 637, 648 (1984).

(c) *Carr not upgraded to A class*

In February 1988 Bruce Carr and three or four other employees bid on an inspector position. Marvin Gardner, the plant superintendent, informed Carr that Gardner was not selecting him or any of the others because he felt no one was qualified. Gardner told him he felt Carr did not have enough experience in the fabrication area. Carr replied that he had run several of the machines there, had worked in different plants, and thought that with a little training he would be able to do the job. Gardner said there was no time to train anyone, that Farr needed someone who could do the job now on the second shift. A March 3 letter (G.C. Exh. 37) from Pickney to Carr and the other bidders notified them in writing of their rejection. The inspection position had a higher pay ceiling than Carr's welding position (3:282–287). Bobby E. Loueallen, who had applied for a welding position, was hired from outside Farr as the inspector (3:285; 5:899: 8:1549). As we have seen, witness Loueallen worked for Farr from March to mid-October 1988 (5:899, 950). There is no allegation concerning this inspector position.

In February 1988, Pickney testified, Carr took, over several days, the Stewart & Stevenson (S & S) welding standards test, passing it on February 25 (8:1503–1505). Such test apparently serves as Farr's A class welder's test. Carr testified that he took the A class welding test, a physical welding test of four different welds, around March 1 (3:287–288). Supervisor Danny Tinch testified he administers the testing, and that Carr took and passed the A class welding test (10:1850–1852). Carr testified that about 2 weeks later he asked Tinch about the test results. Tinch said the test plates had gone to the inspectors and to Victor Pufahl, the plant manager, that Carr had passed, but that Pufahl said he was not going to promote Carr to A class at that time because he felt Carr's production was too low (3:288). According to Tinch, who does not address Carr's specific testimony, Tinch does not recall a conversation with Carr about A class welder positions (10:1894).

A class welder Ray Smith testified that on one occasion he had to go from 2-D to Hi-Bay. In Hi-Bay he saw some welding work that was Carr's. Smith is a brother-in-law of Supervisor Danny Tinch (5:766, 768). On complimenting Carr's work to Tinch, Smith said he did not know Carr was certified to do the S & S work. Tinch explained that Carr had passed the test but Pufahl did not reclassify Carr (promote to A class) because Carr was ''slow'' on welding. Smith estimated the occasion as being about 2 months after Carr's (December 7, 1987) transfer to Hi-Bay (5:766–767, 841). Neither Tinch nor Pufahl addresses the point in his own testimony. Crediting Smith, I find that the conversation occurred in about March 1988.

In about late April 1988, Carr testified, Supervisor Tinch asked Carr if he would transfer to Hi-Bay's recently established evening shift (4 p.m. to 12:30 a.m.) so that Tinch could train two new welders on the day shift. Carr agreed to transfer to the evening shift. Not long after the transfer Carr (separately) asked Tinch and Pickney about his failure to be promoted to A class welder. Pickney told him he did not know but would check (3:289–290).

Agreeing that Carr asked him in Hi-Bay in about early May why he was not an A class welder, Pickney asserts he said that was something Carr would have to ask Danny Tinch. Carr replied he had done so and that Tinch told him he did not know why. ''Well, you deserve an answer, and I'll get you an answer,'' Pickney responded (8:1542–1543). At a meeting with Tinch, Pickney, and Glen Moring in the Hi-Bay office on May 10, Carr testified, one of the Farr representatives (Pickney, presumably) game him a memo of that date from Pickney to Carr concerning Carr's promotion inquiry. They also told him Farr had no opening at the time for an A class welder, but when Farr did have then Carr would be considered. His A class test results were fine, Carr was told (3:290-293, 441). The text of Pickney's May 10 memo to Carr reads (G.C. Exh. 3; 8:1373):

> This memo is in reference to your recent inquiry about not being promoted to A-Class Welder.
>
> As you know, a promotion will be granted only after it has been determined there is a need for the particular position. Once that is established then an individual is considered based on the following:
>
> (1) Ability
> (2) Experience
> (3) Conduct
> (4) Attitude
> (5) Seniority
>
> To date, four employees have been promoted to A-Class in High-Bay. All four have displayed more overall ability and have more experience in the High-Bay Department than you do.
>
> When additional A-Class welders are needed you will be considered based on the above listed criteria.
>
> Thank you,
>
> /s/ Darrell
> Darrell

[19] Farr did not object when the General Counsel first entered the area with the Government's first witness, Personnel Manager Pickney (1:100–101).

One key difference from what Carr had been told in late November 1987, as I summarized earlier, is the caveat that there must be a ''need'' for an A class welder in Hi-Bay before Carr could be promoted. Even then, it is clear, he would have to bid and be ranked along with any competing bidders. Recall that Carr had stopped wearing his IUE sticker in about late January to early February 1988 (2:270; 4:679). Within a day or two of the May 10 Hi-Bay meeting where he received Pickney's May 10 memo, Carr painted ''IUE'' on his hard hat (2:293).

c. *Promotion allegations*

(1) Introduction

Recall that the allegation (complaint par. 11) here is that in June 1988 Farr unlawfully failed to promote Bruce Carr to the leadman and A class welder positions. The allegation needs clarification. The lead position came open first—in about late May 1988. Passing over B class welders Carr and Dewayne Jacks, Plant Superintendent Marvin Gardner chose A class welder James Chapman. Chapman's promotion to lead welder created an A class welder vacancy. Carr and others bid on it. Respondent selected Roy Cline.

(2) Leadman

(a) *Evidence*

Personnel Manager Darrell D. Pickney testified Bruce Carr, James Chapman, and Dewayne Jacks bid on the lead vacancy in department 2-D (main plant), and that Plant Superintendent Marvin Gardner, in consultation with Supervisor Ray Copeland, selected Chapman (1:108–109). The text of Pickney's June 8 memo to Chapman, Carr, and Jacks reads (G.C. Exh. 17; 2:294; 8:1385):

> Thank you for your interest in bidding on the Leadman vacancy in 2-D.
>
> After careful consideration of all bids received, management has decided to offer this position to James Chapman. The determining factors in making this decision were his overall ability and experience.
>
> I urge you to continue to bid on any openings that you are interested in and feel your are qualified to perform.

Marvin L. Gardner is superintendent over the main plant (12:2294). Gardner testified that his only involvement in the lead selection was to approve the selection decision made by Supervisors Comer Reynolds and Ray Copeland, with the personnel manager, Darrell Pickney, handling the paperwork (12:2298–2299). Meeting together with Gardner, Reynolds and Copeland recommended Chapman over Carr based on skill and ability. Gardner knew both Chapman and Carr, but, thinking he did not work closely enough with them, he relied on the evaluations of the two supervisors (12:2299–2300). Gardner understood that Chapman had more experience, was an A class welder, and had done more jobs in the department (12:2313). The discipline and attendance records of the bidders were considered. A poor absenteeism record would hurt rather than help (12:2316). Gardner denies that union sentiments were mentioned or considered in the promotion decision (12:2300–2301).

As previously summarized, Comer C. Reynolds testified that Bruce Carr had worked for him in 2-D in 1986 and 1987 before transferring to Hi-Bay, and that his experience, working the second shift, was limited mainly to engine products (12:2325). Chapman also had worked for Reynolds, although not at the time of the lead person selection. In contrast to Carr, according to Reynolds, Chapman had broad experience on everything Farr had, from engine products to the Tenkays and larger units Farr built (12:2326). The lead vacancy was for Reynolds' department, and he recommended Chapman to Gardner. He also discussed with Gardner, as earlier described, Carr's (supposedly) low production (12:2326–2328). According to Reynolds, no one else was present when he made his recommendation to Gardner (12:2327, 2380). On cross-examination Gardner conceded that in 1986 and 1987 Carr, in doing MIG, TIG, and flux core welding,[20] operated the primary machines of department 2-D (12:2379–2380).

Raymond E. Copeland testified he told Gardner that Carr was a good welder, had the knowledge and experience to do the job, but was a little slow. Copeland based this evaluation on Carr's work for him in Hi-Bay. Copeland had worked very little around Chapman, but told Gardner he knew Chapman had welded the whole range of units in 2-D. Although Copeland made no recommendation on who should get the job, he told Gardner that he felt Chapman was the better candidate. That opinion, Copeland testified, had nothing to do with the union, and the union was never a topic in the discussion (12:2408–2410, 2447). Apparently Copeland was alone with Gardner when Copeland gave his evaluation (12:2446). On cross-examination Copeland conceded that what he knew about Chapman's work basically came from what Comer Reynolds told him (12:2446–2447).

Bruce Carr testified that after the lead position was awarded to Chapman he had a conversation about it with supervisor Copeland in Hi-Bay. Copeland, Carr testified, said he had pushed for Carr as much as he could but his back was against the wall and he could do no more, that he thought it was a bunch of ''baloney.'' (3:296.)

Agreeing that afterwards he and Carr had a conversation, Copeland asserts that Carr complained he was being treated unfairly. Copeland states he told Carr he gave Carr ''a recommendation as best I could,'' but denies Carr's testimonial phrases of ''back against the wall'' and ''bunch of baloney.'' Copeland asserts he reminded Carr of Farr's grievance procedure and that he could complain to Plant Manager Vic Pufahl (12:2411). On cross-examination Copeland conceded that he did not recommend Carr for the job (12:2447).

Carr testified that Chapman wore no union insignia and was very vocal in his opposition against the Union (2:296; 12:2523). Pickney testified that Chapman wore an IUE sticker during the 1987 union campaign but not thereafter so far as he knew (8:1385; 9:1638). Dewayne Jacks also wore an IUE sticker, Pickney testified (8:1385). Chapman was an A class welder whereas Carr and Jacks were B class (8:1386).

Chapman's employment application dated March 25, 1986, reflects that he was scheduled to report for work on July 21, 1986 (R. Exh. 40). Born November 16, 1962, Chapman records on his application that he is qualified to operate the following welding machines: heliarc, arc, and spot. He did not mark the box for gas welding. Nor did he mark the box

[20] Later I discuss the types of welding in more detail.

indicating he could read blueprints. On his application, Carr (born July 22, 1960), marked boxes showing that he could read blueprints and do gas, arc, and spot welding. Carr did not mark the box for heliarc welding (R. Exh. 10).

Chapman was promoted to A class welder effective October 19, 1987 (R. Exh. 41). In a space provided for explaining the reason for the change, the reason given is: ''Past welding test move to class A.'' Nothing on the form suggests that Chapman was promoted from B class because there was a vacant A class position.

Two appraisals of Chapman are in evidence. The first (G.C. Exh. 30a) is by Supervisor Danny Tinch who signed the evaluation on December 4, 1987. Other than the unmarked attendance boxes, all the middle boxes are marked. Tinch's comments are generally favorable except as to attendance (has missed 5 days and needs to improve) and promptness (late 6 days). Tinch's overall comment is, ''James does a real good job.'' For Chapman's May 2 (or possibly May 3) 1988 appraisal, Tinch marked all the middle boxes (G.C. Exh. 30b), and all comments are good. Attendance had improved (absent 2 days) as had promptness (left early 1 day). Tinch's overall comment reads, ''James has improved a lot on working and absentee record.''

Tinch's figures on Chapman's absences (two) during the 6-month appraisal period ending May 2, 1988, apparently were incorrect, for by memo (G.C. Exh. 18) dated May 18, 1988, Pickney wrote Glen Moring (Hi-Bay's manager) and Supervisor Danny Tinch as follows on the subject of James Chapman's absenteeism (1:110):

> Under the provisions of our absentee policy the absence of James Chapman on May 16 is cause for termination.
>
> On review, his records show he received a final written warning on October 21, 1987 for absenteeism. After that warning, he showed great improvement and was not absent again until April 12, 1988. He was again absent on April 13, April 25, April 26 and May 16. As you can see, the problem has surfaced again.
>
> If an exception is made at this time to allow him to continue his employment, then a single absence between now and June 21 will again be cause for termination.

Although Pickney, early in the hearing, testified that Chapman was not discharged following this memo (1:110), neither Pickney, Gardner, nor any Farr official testified why Chapman was given—apparently—yet another chance following three absences in April 1988 and an absence on May 16. Thus, on June 8 when Farr selected Chapman, rather than Carr, for promotion to A class, a single absence between then and June 21 would have resulted in Chapman's discharge (G.C. Exh. 18).

Although Bruce Carr's attendance did not reach the precarious level before June 1988, as did Chapman's, Carr did have a history of attendance problems. As I summarized earlier, in his last two 6-month appraisal periods ending in January 1988, Carr was absent 3 days during each period (G.C. Exhs. 33, 32). His promptness in the first half of 1987 was poor, but that category improved considerably (left early 1 day) in the second half. On August 25, 1987, Supervisor Reynolds recorded a ''correctional interview'' with Carr concerning his attendance (R. Exh. 16; 9:1633, Pickney), and 2 months later, on October 21, Farr issued Carr a written warning for excessive absenteeism. Carr (who signed his concurrence with Farr's statement) had been absent, according to the written warning, on August 18 and October 12 and 19. The warning advised him, ''Further neglect of your absentee record will result in a final written warning.'' (R. Exh. 17; 8:1367–1368.)

Carr received that final written warning (G.C. Exh. 15), under Farr's attendance policy (recall that attendance and performance policies are separate), although not until August 24, 1988, following his leaving the plant early on August 19 (1:103–104; 3:428–429). (Later I discuss the events of August 19.) The first sentence of the ''Company Statement'' portion of the August 19 warning reads: ''Since receiving 1st written warning for excessive absenteeism [10–21–87; R. Exh. 17], you have been absent 3 days, left early 3 days, and have been tardy 2 days.'' No dates are given for the absences, tardies, or leaving earlies. Although it is possible they all occurred after the late May 1988 bidding on the lead position, I assume they were scattered across the months since October 21, 1987. The warning to Carr concludes by advising Carr this is his final written warning for absenteeism, that his job is in jeopardy if his attendance does not improve, and that ''One absence within a 3-month period will be reason for termination.''

Because the record does not contain a copy of Chapman's ''final'' written warning of October 21, 1987, for absentism, we do not know whether he was given a 3-month ''sudden death'' probation as Carr was in August 1988. However, I infer that Chapman was not placed on any probation, for even his extra last chance in Pickney's May 18 memo limited Chapman's ''sudden death'' probation to 1 month. Pickney's June 8 memo (G.C. Exh. 17) to the three bidders does not list attendance as one of the ''determining'' factors.

As for training classes while at Farr, in March 1988 Bruce Carr was awarded a certificate (G.C. Exh. 40) for successfully completing 36 hours in training to read blueprints. Carr testified that Chapman did not attend this class (3:315–317). The record reflects that Farr offered the course later in March, extending into April, but Chapman is not on that list of attendees either (R. Exh. 70). Dewayne Jacks is listed, however. Based on the records in evidence, and the absence of any records showing that Chapman ever attended such a class at Farr, I infer that he never did before his selection for the lead position.

(b) *Analysis and conclusions*

As with topics I summarized earlier, I find that Bruce Carr testified with a persuasive demeanor, and I credit him. I do not believe Farr's personnel and supervisory officials, Pickney, Gardner, Copeland, or Reynolds. Nevertheless, I shall dismiss complaint paragraph 11 as to the lead welder allegation.

Recall that Pickney's May 10, 1988 memo (G.C. Exh. 3) to Carr, about not being promoted to A class welder, lists the factors considered for promotion to any position at Farr (1:54–55, Pickney):

1. Ability
2. Experience
3. Conduct

4. Attitude
5. Seniority

Pickney's list of five factors is lifted from the promotion section of Farr's employee handbook. That section reads (G.C. Exh. 5 at 16):

> JOB PREFERENCE
>
> If you desire consideration for a higher labor classification [promotion], file a job preference slip with your supervisor. All job preference or transfer to another job slips will be filed with the Personnel Department. When a job opening occurs, all employees who, as of that date, had requested promotion or transfer to that job and who are found by the Company to be qualified for the job will be considered for promotion or transfer. The employee who is deemed best qualified by ability, experience, conduct, attitude and seniority will be selected. All other factors being equal, the employee with the greatest length of service will be promoted. In the absence of a qualified employees the vacancy may be filled by a new hire.

No evidence was presented showing how these five factors correlate with the categories on Farr's appraisal form. ''Ability'' apparently would encompass quantity, quality, and work knowledge, and presumably ''conduct'' would incorporate initiative, safety & housekeeping, attendance, and any discipline. ''Attitude'' seems broader than the appraisal category of ''effect on others,'' and no doubt also could relate to ''initiative,'' ''attendance,'' the job, and to Farr. The ''determining'' factors in Chapman's selection for the lead position, according to Pickney's June 8 memo to the three bidders, are the first two, Chapman's ''overall ability and experience.'' (G.C. Exh. 17; 8:1386; 9:1639.)

Let us examine the handbook factors, beginning with the last. On *seniority*, Carr has the edge. He reported for work on April 23, 1986 (R. Exh. 10 at 2, 3) whereas Chapman did not begin work until July 21, 1986 (R. Exh. 40 at 2). Carr's rough recollection that Chapman began working in about May or June (12:2551) is slightly off. *Attitude*. The available evidence suggests that Carr and Chapman would be rated about equal on this factor except for the poor evaluation Carr received on January 13, 1988. *Conduct*. There is no evidence Chapman received any discipline other than the previously described attendance warnings. The (animus motivated) January 1988 performance warning issued to Carr damages Carr's chances here. As we have only two appraisals in evidence for Chapman, it is difficult to compare ratings. Chapman received only a single comment (''steady worker'') on initiative, and the comment, by supervisor Tinch on May 2, 1988 (G.C. Exh. 30b), was favorable.

For *housekeeping* Tinch observed (on December 4, 1987; G.C. Exh. 30a) that Chapman needed to improve. Chapman apparently did so during the following 6 months. Carr's appraisals on the two categories of initiative and safety/housekeeping are mixed. To a slight extent that could be a reflection of the fact Carr had appraisals from four supervisors (Green, Reynolds, Smith, and Tinch), whereas the two appraisals in evidence for Chapman are by Tinch. As even Carr's early appraisals for these categories are not as favorable as Chapman's later ones, Chapman has the edge here. On *attendance* Carr has the favorable edge. All in all, the conduct factor appears about equal—except that the January 1988 appraisal damages Carr.

Ability and *experience*. To some extent these factors overlap, for with experience a person can improve his or her skills. The ability factor would encompass the three appraisal categories of quantity, quality, and work knowledge. As we saw earlier, Tinch was quite satisfied with Chapman in these appraisal categories. The January 1988 appraisal of Carr by Tinch/Reynolds (although motivated by union animus) remains viable; it is damaging to Carr because it finds his production unsatisfactory.

As a witness, Tinch was not asked about Chapman's work. Indeed, Marvin Gardner apparently did not ask Tinch for his recommendation on Chapman even though Chapman had been working the day shift in Hi-Bay for Tinch. Carr testified that Chapman transferred to Hi-Bay in the spring of 1987 (12:2551). When Carr transferred to Hi-Bay in early December 1987, he and Chapman both worked the day shift until Carr transferred to the evening shift around late April on May 1988 (3:289; 12:2552–2553). Before that, from his reporting date of July 21, 1986, until his transfer to Hi-Bay in the spring of 1987, or roughly 9 months later, Chapman worked for Comer Reynolds.

Reynolds testified in rather glowing terms about Chapman's experience at Farr. As to Chapman's ability, Reynolds apparently relies on his observation that Chapman was an A class welder. Moreover, as Reynolds points out, the lead position was in his own department 2-D (12:2326–2327).

The record contains Farr's written job description (G.C. Exh. 4) for ''Welder A'' (1:56, Pickney). Oddly, the evidence does not include a job description for the lead position. Pickney testified that a person promoted to lead would earn another 20 cents per hour (1:58). The ''Welder A'' job description, after giving a summary of the job and the work performed, repeats the nine factors listed in Farr's employee handbook in the section, Job Evaluation (G.C. Exh. 5 at 16). The first two factors there are the only ones relevant here: Education and experience. (The other factors refer to such matters as materials, equipment, and physical effort.) Points are assigned to each factor, with the total for all being 380. Education is assigned 71 points, or approximately 18.7 percent of the total. Experience is assigned 158 points, or about 41.6 percent of the total. As there shown, the rating calls for 3 years' experience. Under the education factor the job requires (G.C. Exh. 4):

> Use of fairly complicated drawings and blueprints, advanced shop mathematics, handbook formulas, variety of precision measuring instruments (such as calipers and scale) some trade knowledge in a specific field or process. Equivalent to four years high school.

Returning now to the ''job summary'' and ''work performed'' entries, they read as follows (G.C. Exh. 4):

WELDER A	
Job Summary:	This occupation requires the welding of parts and assemblies of any type and gauge metal with the use of any welding equipment and techniques required to meet specifications . Must be able to be certified according to government specifications.
Work Performed:	Performs such operations as arc heliarc welding on sub assemblies and assemblies. May be required to Perform any standard operation within the department or any new or special jobs with very little supervision. Also due to experience may be required to aid in training inexperienced welders or Welders B and or C on various welding and production techniques.

Listing the units, Carr testified that he had welded on practically everything fabricated in 2-D, including some of the Tenkays (4:448; 12:2549, 2560). He did not work on the 20L size in 2-D, as he later did in Hi-Bay, because Ray Smith did them in 2-D. Carr does not recall working on any 10L size units in 2-D (12:2560–2561). Tenkay (actually, TENKAY) is the name of the dust collecting unit (R. Exh. 3), whereas, as Pickney explained, the numbers 10K, 10L, and such designate sizes of the Tenkay units (10:1836).

Carr testified that he saw, about once a day, what welding Chapman was doing and that most of the time Chapman did short arc welding (12:2550), whereas Carr did heliarc, short arc, and flux core while in 2-D (12:2548). As mentioned earlier, Reynolds admits that Carr had operated the three primary welding processes in 2-D: MIG, TIG, and flux core (12:2379–2380).

Approval for Chapman's promotion to A class welder is dated October 20, 1987 (R. Exh. 41)—ironically, 1 day before Farr issued him a ''final'' written warning for absenteeism (G.C. Exh. 18). Although, as I have found, Chapman did not attend Farr's blueprint training, as Carr did, Farr nevertheless promoted Chapman to ''Welder A.'' As Farr's job description calls for an A welder to be able to read blueprints, and lacking any evidence that Chapman is unable to read blueprints, I presume he can do so. Carr passed the welding test in February 1988 although, according to Pickney, there was no vacancy for Carr to bid on then.

The Government contends that, after disregarding the animus motivated January 1988 evaluation, Carr and Chapman would be ranked approximately equal (Br. 49). I agree. For the reason of limitations, however, the General Counsel errs by seeking to disregard Carr's January 1988 appraisal. From there the General Counsel errs by seeking to disregard Carr's January 1988 warning. The General Counsel argues that ''if'' the reasons advanced by Farr for promoting Chapman are pretextual, an inference can be drawn that the real reason Chapman was promoted, and not Carr, was Carr's union activities. ''If'' is the problem even aside from the limitations shortcoming.

Based on credibility resolutions I have made favoring Carr, and discrediting contrary testimony by Comer Reynolds and others, I have found Carr to be, in effect, the equivalent of an A class welder as of his passing the February 1988 welding test. I also find that Farr's appraisal of Carr in January 1988 was motivated by union animus. I further find that the testimony given by Reynolds, Copeland, and the others, denigrating Carr's production and experience, was false, and that it was false because of Carr's union activities.

These findings suggest that a motivating reason for not promoting Bruce Carr to lead welder was Carr's union activities. If the only candidate for the position had been Carr, and he had been rejected as unqualified, then the Government would have established a prima facie case. But Carr was not the only candidate, or bidder. ''A'' welder James Chapman bid, as did B class welder Dewayne Jacks, and Farr selected Chapman over Carr or Jacks. The evidence shows that Chapman was qualified. Carr did testify that Chapman's experience was limited mostly to short arc welding. Aside from the fact Carr does not connect that type welding to the type units welded. Carr, by his own testimony, could observe Chapman only once a day. Even crediting Carr on this, as I do, there nevertheless was a lot of time for Chapman to have worked on other machines and units. Thus, the evidence fails to show that Chapman was substantially less qualified than Bruce Carr.

Moreover, the parties do not address the bid of Dewayne Jacks. The evidence does not clearly disclose whether Farr ranked the three bidders 1-2-3, or 1-2-2. Whose burden it was to establish this I need not pause to determine. Finding that the General Counsel has failed to establish a prima facie case of unlawfully failing to promote Bruce Carr to lead welder in June 1988, I shall dismiss that portion of complaint paragraph 11.

(3) Class A welder

(a) *Evidence*

James Chapman's promotion from welder A to lead welder created an opening in Hi-Bay for an A class welder (1:111; 8:1374; 9:1637, Pickney), and some 7 or 8 Hi-Bay employees bid on the posted vacancy (1:111; 8:1374, Pickney; 9:1707, Moring). Glen A. Moring, Hi-Bay's manager, decided on whom to eliminate and whom to select, and Victor Pufahl, the plant manager, approved Moring's selection (9:1706). After making his eliminations, Moring was left with three finalists (8:1375; 9:1634, Pickney; 9:1712, Moring): Bruce Carr, Roy Cline, and William Landers. In a tough decision to make, Moring testified, Moring chose Roy Cline based on Cline's better productivity (9:1710, 1712, 1718, 1792). Approval of Cline's promotion is dated on the personnel status change card as June 24, with the effective date shown as 6 a.m. on June 27 (R. Exh. 39).

After reviewing the personnel files of the three finalists, Moring ascertained that while Cline had received a ''caution'' on production (9:1712), Carr had received some warnings for productivity (9:1792–1793). Moring appears to have lumped the comments on some of Carr's semi-annual ap-

praisals with the single (and, I have found, unlawfully motivated) written warning issued to Carr, for low production, in mid-January 1988 (9:1793–1794).[21] According to Moring, he also reviewed some closed production reports (9:1713, 1795), and some comparisons of work done on spark arresters (9:1712–1713, 1794). It is unclear whether he reviewed labor cards as distinguished from closed orders production reports (9:1792). On the closed production reports, Moring does not recall how many months he looked at or what months he reviewed (9:1795).

The spark arresters Moring refers to, described in two of Farr's exhibits (R. Exhs. 81 and 94), are the spark traps (10:1832, Pickney) described earlier. Moring testified that he had supervisor Danny Tinch accumulate production data on the job, that at one time Moring had the data sheet, but that he no longer had it (9:1713, 1795). When Tinch testified the next day, he confirmed that Moring had requested the count (10:1861). Explaining that counsel had asked him that morning about the data sheet, Tinch testified that he found a copy (R. Exh. 94) in a file Tinch keeps in his office (10:1862, 1874–1875).

Supervisor Tinch's unsigned data sheet, consisting of his statement that he recorded data on a small job of spark traps, shows a count for Carr and Cline over June 8–10, 1988. Pickney's recap made for the trial (R. Exh. 81-1; 10:1937) based on the underlying documents (9:1516) repeats the data as follows:

Date	*Employee*	*Hours*	*Production*
6–8–88	Bruce Carr	8.0	14 pcs.
6–9–88	Bruce Carr	8.0	36 pcs.
6–9–88	Roy Cline	8.0	56 pcs.
6–10–88	Roy Cline	7.5	60 pcs.

The total is Carr 50 pieces and Cline 116. Tinch testified that he counted Cline, who worked on the day shift, and had second-shift welding lead Richard Witt count Carr's production (10:1861, 1868). Witt confirms such an event (11:2222–2224). As Moring concedes (9:1690), for some reason the underlying labor cards of the welders do not record the number of pieces finished in the column for that data (R. Exh. 81-1, -3). Unfortunately, Carr was not asked about this discrepancy, or the reason if any he knew, for the greater production count for Cline. Elsewhere Carr does say that helpers on the day shift assisted the welders whereas on the evening shift the helpers usually did cleaning (12:2524–2525).

Tinch's data sheet is dated June 9, 1988. On cross-examination, Tinch testified that Moring asked for the count a week or more after the A welder position was posted (10:1871). As we already know, Pickney's memo to Chapman, Carr, and Jacks, confirming that Chapman had been selected as welding lead, is dated June 8 (G.C. Exh. 17). The promotion was not approved until June 9, with the effective date being June 13, 1988 (R. Exh. 43), a Monday. Although no memo issued confirming Cline's selection (9:1638), the personnel status change form reflects that Cline's promotion to A class was approved on June 24, effective (Monday) June 27 (R. Exh. 39; 8:1436).

The question raised by the date sequence is the apparent discrepancies. Moring testified that in his decision process on the A class welder selection he reviewed a comparison done on spark traps. Tinch testified that, in effect, it was at least mid June before Moring requested the study—yet his data sheet bears the date of June 9. In an apparent effort to clarify matters, Moring again took the stand on the last day of the hearing. In his uncertain and confusing fashion of testifying, Moring first stated that he asked Tinch to record the numbers—apparently for production management purposes. On second thought, Moring thinks this was during the time of an opening in 2-D for a lead welder (12:2399). Pressed as to why that fact would cause him to generate such a document, Moring answered (12:2400):

> A. Well, again, that's not the only reason, but if any of my people bid on that job in the A positions, if that's what you're getting to, is that there could be an opening in my area for an A position.

Moring then named James Chapman, Richard Witt, and Gene Haner who, from Hi-Bay, possibly would be interested in bidding on (Moring apparently is saying) the lead position. If one from Hi-Bay were successful it would open a vacancy for an A welder to replace the person successfully bidding on the leadman's position (12:2400). Asked if the two (Carr and Cline) were the only potential candidates for such an anticipated A class opening, Moring testified ''No.'' Production of the other (potential) candidates was not studied, Moring asserts, because ''To my knowledge, these [Carr and Cline] were the only two people that worked on this particular job.'' (12:2401.) Assuming that is so, Moring offers no explanation why production of the other B welders was not counted on other jobs. On cross-examination, Moring concedes that if neither Chapman, Witt, nor Haner were the successful bidder on the lead vacancy in 2-D (that is, if someone from 2-D or from the lower ranks in 2-D or Hi-Bay were the successful bidder), then no A position would have opened in Hi-Bay (12:2405–2406).

Moring usually testified in a nonspecific fashion and with an unfavorable demeanor, and I do not believe him. The General Counsel fails to address the June 1988 count by Tinch (Roy Cline) and Witt (Bruce Carr) of the spark traps. Cline's alleged count is much higher. On the other hand, the circumstances are suspicious and witnesses Moring and Tinch unreliable. Thus, why were counts not made of the other potential candidates for the A class position? Why were no closed order production reports, or other usual business records, introduced showing the actual production count rather than relying on a handwritten note bearing a date (June 9) which falls in the middle of the production and which looks as if it was added after the event? Did Cline receive assistance from helpers? Finally, did Moring or Tinch suggest to Cline (but not to Carr) that he work at top speed on the project because Moring would use the count in evaluating the A class bids?

[21] At p. 16 of the Government's brief, the General Counsel writes, at fn. 9, ''Respondent failed to introduce any warnings to Carr concerning productivity that were given prior to June 27, 1988.'' (Recall that June 27 was the effective date of Cline's promotion to A class.) That Moring was unable to specify any can be argued, and is, as a factor detracting from Moring's credibility. But for the Government to assert that Farr failed to introduce any productivity warnings given to Carr before Cline's selection is misleading. Farr did not have to introduce such an exhibit because the General Counsel already had done so with G.C. Exh. 14—the January 19, 1988 written warning to Carr for ''sub-standard production.''

Asked on cross-examination whether Roy Cline had a nickname, Carr answered ''Fire Ball Roy.'' Although acknowledging that Cline was fast, Carr, asked why Cline had that particular nickname, explained, ''Because he put it together and didn't care what it looked like.'' (4:460.) Pickney testified that Cline's quality was normally very good, with no problems until after his promotion to welder A when he received his first written warning for bad quality on a unit (8:1375–1376). Respondent's table of warnings to current employees (R. Exh. 2) lists Cline as receiving that warning on October 10, 1988. Richard L. Witt, who served as leadman on the second shift in Hi-Bay the last 8 months of 1988, testified that he could recall no poor work done by Roy Cline (7:1218–1219).[22] The record does not reflect whether Witt ever knew anything about Cline's October 10 warning or the underlying facts.

Describing a sample performance record form which he began keeping in 1988 for employees at the request of Hi-Bay Manager Moring (10:1881, 1891–1892), Supervisor Danny Tinch identified a performance record (G.C. Exh. 58) which he maintained on Roy Cline from July 11, 1988, to October 7, 1988. Several comments are about poor quality. The single ''good'' comment, for September 20, reads: ''Welded in good time. But missed a lot of welds.'' In short, Tinch's recorded admission confirms Carr's testimony about Cline's speed and quality. Cline's employment application (G.C. Exh. 19) shows but one welding position, from February 1983 to February 1986 at Daco. Over the next 2 years Cline (who did not testify) worked in maintenance for Continental Systems, with the last year, ending in February 1988, as a supervisor. The face of Cline's application has all the boxes for welding skills marked. Pickney claims that Roy Cline was ''overqualified'' when he hired him as a ''C'' welder on March 15, 1988, and that explains his promotion to welder B on March 28, about 2 weeks later. The ''C'' position is all that was open at the time, Pickney explains, and Cline even did welding as a working supervisor at Continental (1:114–1l7). Cline received a certificate (R. Exh. 38) for successfully completing the 36-hour math and blueprint class conducted at Farr (R. Exh. 70) by the vocational technical education division of the Arkansas Department of Education in March–April 1988 (8:1434–1435). Carr (3:299–300) and Moring (9:1803) testified that Roy Cline did not wear any IUE insignia.

Before Cline's June 1988 selection for the welder A vacancy, he had received one written appraisal. Signed May 2 by Supervisor Tinch, the evaluation is Cline's appraisal for the May 15 close of his 60-day probation period (G.C. Exh. 20). Tinch marked all the middle boxes for the performance categories, and the third, or best, boxes for the two (absence, promptness) attendance categories (always at work, always prompt). Tinch's sparse comments range from ''does good production,'' ''good quality,'' ''steady worker,'' to ''works well with others.'' Tinch added no overall comments.

As mentioned earlier, Pickney testified that Cline's record was clear on quality before his promotion to welder A. The only contrary evidence is Carr's testimony describing Cline's bipolar reputation: a fast welder, but of welds considered by his peers to be of dubious quality. This yin/yang[23] relationship between quality (roughly the yin) and quantity (roughly corresponding to the yang) is generalized and subjective in the record.

At several points witnesses assert that Farr has written specifications for its welding jobs. For example, Carr at 3:333–334; 4:571; Supervisor Bowman at 11:2028, 2094, 2109, 2113, 2180; Carlos Diggs at 11:2264; and Supervisor Copeland at 12:2431, 2461. Presumably the prints have graphic illustrations depicting specific standards of quality for the welds. No such prints were offered in evidence. Moring testified that there must be a balance between quality and quantity (9:1805), as did Farr's senior inspector, Carlos R. Diggs (11:2234). Former inspector Bobby Loueallen agrees (5:955, 966–967). Diggs testified that Plant Manager Pufahl wants quality and quantity balanced (id.). Sometimes Pufahl overrules the inspectors and rejects what they have deemed acceptable (11:2233).

Pufahl testified his policy is that inspectors have authority to reject anything which fails to meet the criteria of the *prints*, and they can hold any product until a member of management or engineering resolves a question about quality (12:2281–2282). Moreover, Pufahl states it is possible that an inspector might call him over to look at a weld (12:2288). Thus, it appears that Pufahl expects weld quality to meet whatever standard is set forth in certain printed specifications. From the nature of the evidence, I infer that the ''prints'' specify a high standard of quality for welds.

At one point Diggs refers to drawings, saying that a drawing may call for a weld to be flush (11:2264). As Diggs explains, however, that inspection does not bear on the quality of the weld (id.) Diggs advises that the inspectors, in checking the quality of a weld bead, look for porosity, undercuts, cold laps, and such defects (11:2271). Again, however, no objective standard for this procedure is evidenced in the record. Such defects apparently are recognized by experienced welders and inspectors. Standard welding texts show profiles of desired and defective welds. See, for example, R. J. Sacks, *Essentials of Welding* at 66–70, 358 (1984, Bennett Pub. Co.) and L. Koellhoffer, A. F. Manz, and E. G. Hornberger, *Welding Processes and Practices* at 14–18 (1988, John Wiley & Sons).

Despite Farr's requirement that welds meet an apparently high quality standard set forth in printed specifications, the opposing force of competitive production needs tempered any enthusiasm for quality. Thus, former Quality Control Inspector Bobby Loueallen testified that both Victor Pufahl, the plant manager, and Marvin Gardner, the plant superintendent, had told him not to overinspect because ''the product had to go out the door.'' (5:924–925.) Pufahl denies making any such remarks (12:2281). Gardner does not address the topic in his testimony.

[22] Witt apparently became leadman about May 1988, or shortly after Chapman did, because he testified his first 3 months were under Supervisor Keith Bowman and that he served as leadman for 8 months in 1988 when Farr shut down the second shift (7:1204–1205). Bowman was hired as Hi-Bay's second-shift supervisor, starting July 18, 1988 (10:1942–1943). Roy Cline worked on the day shift under Supervisor Danny Tinch.

[23] The passive, female/active, male cosmic principles in Chinese dualistic philosophy (American Heritage Dictionary), depicted by a dark shaded/light shaded design, or symbol (Random House Dictionary, 2d ed.). The design appears on each cover of The Labor Lawyer. Editor Robert J. Rabin, in commenting about the cover design in the first issue of The Labor Lawyer, wrote:

> The cover design represents the yin and yang of Oriental philosophy, which holds that out of the interaction of contrasting forces comes new energy and harmony.

1 The Labor Lawyer at v (No. 1, Winter 1985, ABA).

Turning to quantity, I note that the record contains even less of an objective description than for quality. If Farr has a specification, written or otherwise, of so many welded units per specific job order, that specification is not identified in the record. No specification is described that for one job a welder should lay down so many inches of weld per minute, or hour, or weld so many units per 8-hour shift, and on another job a different quantity. Travel speed of the welder can affect both quality and quantity. Moring testified that quality is easier to check than quantity because some jobs involve the work of more than one welder (9:1806). Other jobs are welded by an individual (9:1692, Pickney).

Mentioned earlier is the welding test requirement. To qualify for A class welder, an aspirant must take and pass a welding test. Supervisor Danny Ray Tinch, as noted earlier, administers the welding tests (10:1850). Contrary to one's initial impression, the test is not administered in a separate room or under the watchful eye of Tinch. Instead, candidates simply join eight plates with four weld joints and submit the (now joined as) four plates to Tinch when the candidates are satisfied their welds will pass (9:1727, 1821; 10:1851, 1875–1876). Using a hammer and metal stamp numbers located by the Hi-Bay office, a welder tags his own test plates by stamping into them the last three digits of his clock number (10:1858, 1896, 1899). Test plates remain on the table, outside the Hi-Bay office, for quite awhile (10:1854). Tinch concedes, however, that practice welds normally are not stamped (10:1876).

Moring instructed Tinch to test the finalists (9:1715; 10:1852). As Pickney explains, Bruce Carr, already qualifying by having passed the test in February, did not have to requalify (1:112; 9:1635). When Tinch reminded Moring of this, Moring told Tinch to test Roy Cline and William Landers (9:1715, 1716). Cline and Landers (both of whom worked for Tinch) then proceeded to prepare test welds over, according to Tinch, a 5–6 hour period (10:1852–1853, 1877). Tinch testified that he inspected their welds, determined that the welds passed, and so notified Moring (10:1853, 1876). Tinch then laid the test plates on the floor of his unlocked Hi-Bay office (10:1853). The Hi-Bay office, Moring confirms usually is unlocked and most of the time anyone simply can walk in (9:1823–1825). In June 1988 Copeland, stationed in 2-D, would visit Hi-Bay several times a night to check on matters (9:1824; 12:2408, 2445).

On receiving the notice from Tinch that Cline and Landers had passed, Moring began his final evaluation, selecting Cline on the basis of his greater productivity (9:1717–1718, 1792). Richard Witt testified that Carr's production seemed fine, although on occasion he observed Carr standing around not doing anything (7:1207).

The next day or so after the test, in the Hi-Bay production office (apparently the same as Tinch's office), Moring and Tinch began calling in the finalists and other candidates. Roy Cline was called first and Moring informed him that he had been selected. Carr was called in next and told that Cline had been chosen (9:1719; 10:1855). At that point all agree that Carr asserted that the welds on Cline's test plates contained defects of porosity, undercuts, and others and were too bad to pass a welding test. All agree that Tinch checked a couple of plates and agreed the ones there would not pass. Moring looked at them and agreed. Despite some minor differences on details of the meeting, all agree that the meeting ended on the note that further action would have to occur. Carr states that Moring said something would have to be done (3:303). Moring recalls that he said something was wrong and there would have to be a retest (9:1724). A second test was administered.

Before describing the second test and its associated events, I need to back up to the evening hours of the day Roy Cline and William Landers made their test welds. During the second shift the day of the tests, Carr testified, Carr, Supervisor Ray Copeland, welder lead Richard Witt,[24] and inspector Bobby Loueallen looked at the test plates of Roy Cline and *Steve Tilley*.[25] (3:298.) In Carr's opinion the test welds were very poor because of high porosity, undercut, and they ''were just very poor test plates.'' (3:229.) He determined the plates were Cline and Tilley's by the clock numbers stamped on them. Clock numbers are posted on a list by the bulletin board and the time clock. Additionally, Carr thinks their names possibly were written on the plates with soapstone (3:299). Copeland, Carr testified, said the plates looked like ''shit.'' (3:299.)

Former employee J. D. Greer, then a welder at Farr, testified that he looked at the plates in Copeland's presence and that Copeland described them as ''shit,'' an appraisal Greer seconded on the basis they made a ''sorry C class welding test.'' (7:1243.) Greer testified that he worked in 2-D as a C welder until he transferred to Hi-Bay around June or July 1988 and was promoted to welder B. His supervisor in Hi-Bay was Keith Bowman (7:1236–1237). As discussed earlier, Bowman arrived in mid-July (10:1942). Although Greer's time frame is hazy, it is possible he was working in Hi-Bay in May-June when Copeland still had supervisory jurisdiction over Hi-Bay's evening shift. That being so, it is further possible that he was in Hi-Bay's office inspecting the test plates in the presence of Copeland.

Former Inspector Bobby Loueallen testified that around this time he saw one test plate each of Bruce Carr and two day-shift welders. Loueallen said the names and social security numbers of the welders were written on the test plates with a metal marker. He was in the Hi-Bay office and Moring asked his opinion of the welds. Loueallen said that Carr's was the superior and that the other two did not look like B class welds, much less A. Moring just smiled. (5:909–911.) Moring denies that any such conversation occurred (9:1788–1789).

Later that evening Loueallen again was in the Hi-Bay office and Copeland was there. Loueallen said that Moring had asked his opinion on three test plates, advising that they were by the three applicants for welder A. Loueallen told Copeland that he had told Moring that Carr's looked better and that the other two did not look good enough to be B

[24] As I noted earlier, Witt apparently had only just been selected as a leadman. There is no discussion in the record concerning whether that position was posted for bidding.

[25] There is only limited evidence that Steve Tilley was tested. The first day of the hearing Personnel Manager Darrell Pickney testified that Roy Cline was tested and that he assumed Steve Tilley also was tested (1:112). Subsequently, Pickney testified that the three finalists were Carr, Cline, and Landers (8:1375) and that if he named Tilley it was by mistake (9:1634). Although Moring suggested that Tilley survived the first round of eliminations, and was cut in the second (9:1707, 1711), he told Tinch to test Cline and Landers (9:1716). Carr testified that the first plate Tinch picked up when they were in the office (announcing Cline's selection to Carr) was Tilley's and that he so told Tinch and pointed out the clock numbers to Tinch (2:301). As we see in a moment, Loueallen also named Tilley.

class. Loueallen does not recall whether Copeland, who just looked at the plates, replied (5:909–912, 950–952).

Supervisor Copeland's version is that Carr mentioned the test plates to him and that Loueallen showed him three test plates lying on the floor just outside the office by the door. Although there were test plates inside the office at the time, the ones Loueallen pointed out to him were lying outside the office. To Loueallen's question of what he thought of those weld tests, Copeland, who never picked up the tests or determined whose they were, replied that one looked pretty good and the other like ''shit.'' (12:2412–2413, 2447–2448.)

Former welder lead Richard Witt, a welder A at the time of the hearing because of discontinuation of the evening shift (7:1203–1205), testified that he saw the welds Bruce Carr had made for his A class test and that they were good. Later others took the test when an A class position opened for bidding. Although Witt did not ''review'' those test plates, he did see them stacked on the floor in the (Hi-Bay) office. ''They were poor,'' and would not pass his standards, Witt testified. According to Witt, he did not learn the names of the welders who made those test plates. Afterwards, Roy Cline got the promotion (7:1208–1210).

Carr, Greer, Loueallen, and Witt each testified with a favorable demeanor and I credit them. Moring's demeanor was particularly unfavorable, and I do not believe him. Except where Copeland's testimony is supported by credited evidence, I do not believe Copeland. The testimony of Carr, Greer, Loueallen, and Witt could have been strengthened by more details, and Carr and Greer identify one of the tests as belonging to Steve Tilley. They do not mention any test plates of Landers. Of course, it is possible Tilley had plates there from a previous test, or even from this occasion. The point of telling significance is that there is a common point in their version—the test plates of those taking the test that day looked bad. Unlike Moring's outright (and incredible) denial, Copeland's version has hints that are consistent with the Carr group: (1) the matter was mentioned to him; (2) he did look at some test plates, and one was bad; and (3) there were some test plates on the floor of the office—where Tinch picked up bad plates the next day when Carr protested that Roy Cline did not pass.

Loueallen's description of Moring's showing him three tests, one being Carr's, is consistent with everything. Moring, I find, simply picked up Carr's February 1988 test plates and showed one plate from each of the three finalists to QC inspector Loueallen. Moring's knowing smile at Loueallen's expressed opinion tells it all—Yes, Carr's is superior, and neither Cline's nor Landers' passes, but Carr wo not get the A class because he wears IUE and Cline does not.

As I earlier found, in crediting Loueallen rather than Copeland, a few days after Roy Cline was promoted, Loueallen asked Copeland why Carr did not get the promotion. ''Because he had IUE on his hat,'' Copeland replied.

Return now to events after Carr left Moring and Tinch in the Hi-Bay office. According to Moring, the test was invalid because of the possibility someone had substituted spurious plates for those of Cline and Landers. Tests are not secured and, to Moring, the only proper thing to do was to have a retest, but this time with ''better controls.'' (9:1724–1727, 1798, 1802.) Substitution, it seems, could have been of practice plates scattered around (9:1802). As practice plates normally are not stamped (10:1876), substitution of poor practice plates would require someone's stamping them with Cline's and Lander's clock numbers. The metal stamps, Tinch testified, also are kept in an unlocked cabinet outside the Hi-Bay office (10:1889).

Moring instructed Tinch to retest only Roy Cline (9:1728; 10:1859). Because he already had awarded the job to Cline, Moring testified, there was no need to retest Landers unless and until a retest eliminated Cline. The only qualification Moring imposed was that (A class) QC inspector Carlos Diggs be involved (9:1728).

According to Supervisor Tinch, the next day Cline did a retest—requiring only about 1 hour—and senior inspector Diggs checked the welds. Tinch observed Cline off and on during the 1-hour test. Cline's submission passed, Tinch testified (10:1859, 1876). Diggs confirms that Tinch showed him some test plates, and that he determined they looked good with no defects. He explains, however, that Tinch did not tell him whose test the plates belonged to. This was to avoid ''personalities'' possibly affecting his opinion. Diggs does not recall how many welds Tinch gave him to inspect (11:2245–2246, 2256). If clock numbers were stamped into the test plates, neither Tinch nor Diggs say. Diggs declined to give NLRB Region 26 a statement during the Region's investigation of this case (11:2252). Moring testified at one point that he reviewed some of the retest plates (9:1729), and at another point suggests he did not examine any (9:1797). In any event, he asserts that he relied on the determination by Tinch and Diggs that Roy Cline passed. Accordingly, he decided to let his initial award to Roy Cline stand (9:1729).

If Moring desired a retest with controls objectively securing the integrity of the test and its results, the retest conditions hardly qualify. Diggs did not observe Cline take the retest, and Tinch apparently is the only person who gave the test plates to Diggs. There is no evidence that Tinch obtained from Cline the plates Cline worked on. So far as the record shows, Cline could have slipped in other good plates that Tinch then gave to Diggs, or Tinch could have done so before going to Diggs. We have only Tinch's word that there was no coverup of a bad initial test by Roy Cline (10:1860) and that Cline's retest passed (10:1859). The limited duration of Cline's retest—a single hour—seems strangely short in view of Respondent Farr's own figures show that Cline required 5 to 6 hours for his initial test. Carr's rough recollection of his own earlier test time of 8 to 10 hours (3:440) appears to be short. Carr's labor cards show that he spent 14.7 hours in doing the welds he submitted for his A class test. (R. Exh. 79; 10:1830–1831.) Carr's testimony, on rebuttal cross-examination, that production welding of the four welds would take no more than 2 hours is immaterial (12:2566–2568). It is clear from the record that on test welds the welders could take their time and submit their best work. Moring testified that a test could extend over several days when the welder is unable to spend much time with it. Implied in Moring's statement is the understanding that a welding test joining four sets of two plates each could require at least a few hours.

After reaffirming his selection of Roy Cline following the retest, Moring heard that Carr was concerned that the retest was a coverup. Moring went to Carr and Carr confirmed that report (9:1729). Carr's version uses different words, but the import is the same (3:304). Moring assured Carr there was no coverup. Carr then asked, Moring concedes, that if there

was no coverup, why did Cline not charge (on his labor card) his time to the test. Not knowing the answer, Moring had to seek out Tinch who, in turn, had to check the records. Sure enough, Tinch reported back that Cline had not charged his test time. Moring instructed Tinch to confer with the accounting section so that production would not be charged with the test time spent on direct labor for some job order when it should have been charged to indirect labor. (Cline's labor card was not identified or offered in evidence.) As Moring explained, Farr has cost accounting labor codes for items such as production, meetings, testing, and such (9:1729–1731).[26]

Moring slides over whether he ever returned to Carr and explained that the Cline-Tinch-Moring failure to follow Farr's cost accounting system was a mere recordkeeping inadvertence which had no bearing on any coverup suspicion. Moring testified that he let his decision stand, and whether Cline charged his time properly ''is of no consequence.'' (9:1731.) In Moring's opinion, no member of management or supervision did anything improper respecting the tests (9:1790). Moring testified throughout with a particularly unfavorable demeanor. I do not believe him.

Between the date of the Hi-Bay office meeting, when Moring and Tinch announced to Carr that Cline was the winner, and the date Moring came and told Carr that Cline had been retested, Carr met with Victor Pufahl, the plant manager, and Darrell D. Pickney, the personnel manager. Carr complained that he felt he was being discriminated against because of his union sympathies (3:305–306; 4:455). Carr's complaints covered several items, including matters of perceived unfairness in general rather than simply his own situation. Pufahl said little and suggested that Carr submit his complaints in writing and he would respond (3:307). By a handwritten memo of four pages (G.C. Exh. 38), Carr did so in about the first week of July (3:311). Carr complained of (1) not being promoted to welder A when he passed the A class test in ''March'' (February); (2) not receiving the A promotion that Roy Cline was given in June even though new hires Cline (and Landers) had just been trained on the day shift; (3) B class welders having to do the rework (corrections) for the A welders; and (4) discrimination against second shift welders by revoking their raises for their mistakes while not imposing the same penalty on day-shift welders.

In his written complaint, Carr makes no reference to his union sympathies or activities. Pickney received Carr's written complaint and prepared a report to Pufahl on what he knew about each of the items (R. Exh. 25; 8:1392). Pickney makes no reference to any charge by Carr that union animus by Farr is the basis for the perceived discrimination against Carr. Pickney simply responds to each of Carr's written paragraphs.

By a two-page memo dated July 15, 1988 (G.C. Exh. 39) denying any relief, Pufhal responded to each item Carr mentioned (3:310; 4:456; 8:1393; 9:1642). As the first eight paragraphs bear on the matters I have summarized, I quote them here (G.C. Exh. 39):

> I can find no evidence that you were told you would be promoted to ''A'' Welder during a certain time period. In fact, another employee who also bid on the ''B'' Welder job in the Hi-Bay, at the same time you did, elected to stay in his home department since the ''A'' classification was not guaranteed.
>
> The four initial transferees to the Hi-Bay were there for 4-5 months prior to being promoted to ''A'' Welder.
>
> The promotion criterion was outlined to you in a memo from Darrell Pickney on 5–10–88.
>
> When the latest promotion to ''A'' Welder occurred, there was an apparent mix up in the weld samples submitted and when you pointed this out to Glen Moring, he requested an immediate retest of the person being awarded the job.
>
> The fact that you have taken additional blue print training is good and we encourage all employees to take the various training courses that we offer for self improvement.
>
> The proper charging of time or accounting for time is very important as it is the means by which a company has to determine the final cost of the job.
>
> In the past there has been no restrictions in regards to the number of chances one has to pass the qualification tests. In fact, the initial tests were not all given at the same time per our qualification records.
>
> The reason productivity is so important in promotion considerations is that we have consistently over run the estimates for the time required to build our hi-bay jobs and if we don't improve, we will lose our competitiveness and thereby be unable to secure work for our people.

There is no reference in Pufahl's response to any oral charge by Carr that the basis for Farr's discrimination was his union activities. Pufahl's written answer simply responds to the itemized topics of Carr's written complaint.

Carr thereafter showed Pufahl's response to supervisor Copeland who, Carr testified, said it looked like a ''bunch of bull'' to him. Copeland suggested that Carr send copies of his complaint and Pufahl's response to corporate headquarters for he felt they might help Carr (3:312; 4:459, 680). Denying the ''bunch of bull'' assertion, Copeland testified he told Carr that Corporate had the last decision, that Carr had a grievance procedure in the handbook, and that if he followed it he would get another [additional or different?] answer (12:2414–2415). I credit Carr to the limited extent the versions differ. Copeland also testified he was not aware of any comment by management that would indicate union activities had anything to do with Carr's promotion rejections (12:2416). I do not believe Copeland.

Under Farr's ''Problem Review Procedure'' set forth in the handbook (G.C. Exh. 5 at 16–17), the next, or third, step would have been to request review by a committee consisting of two coworkers selected by Carr, two knowledgeable representatives designated by Pufahl, with Pufahl as the chair. The committee's recommendation would be submitted to the vice president of manufacturing in California for final decision (G.C. Exh. 5 at 17; 4:458). Carr testified he did not

[26] Farr's list of codes numbers for direct and indirect labor is in evidence as G.C. Exh. 59 (10:1939–1940). The code number for testing, 017, is listed as a direct labor item. Whether that ''testing'' is the same testing done when Carr, Cline, and the others took their welding tests is unclear. A different set of numbers appears on Carr's labor cards for his ''A'' test in February 1988 (R. Exh. 79).

go to the step 3 procedure because he felt it would not help (4:459, 680).

(b) *Analysis and conclusions*

The credited facts show that Farr passed over the superior welds of Bruce Carr and chose Roy Cline for welder A knowing full well that Cline's initial welding test did not pass. Respondent Farr's reliance on low production by Carr on spark traps in early June, when compared to Roy Cline's production, even if not based on a setup with insider information slipped to Cline, is pretextual, I find. When Carr caught Moring and Tinch by surprise in their attempt to pass Cline based on defective welds, Moring hastily said something would have to be done. The ''controls'' Moring speaks of are the equivalent to assigning the fox to guard the chickens. The 1-hour retest, I find, was a fraud. As Copeland said afterwards, the reason Farr did not select Carr (the senior welder by far) for the A class welder was because he wore IUE on his hat.

The General Counsel adduced a strong prima facie case. To the extent Bruce Carr had any lower production than Roy Cline, I find that Respondent Farr seized on that as a pretext to deny a promotion to the IUE's most visible supporter. Farr has not carried its burden of demonstrating that it would have rejected Carr and selected Roy Cline notwithstanding Carr's IUE activities.

Although the parties apparently assume that if Cline should not have been selected then Carr should have been, something must be said about the bid of William Landers. According to Moring, he does not know what he would have done had Cline not passed the retest, although he is confident Landers could have passed a retest (9:1729). To the extent that means he considered Landers on a par with Bruce Carr, I do not believe Moring. Despite the mention of the wrong name for the second set of test plates, it is clear from witnesses such as former leadman Richard Witt that both sets in the office were defective. That includes Landers! In any event, Farr did not show that, if Cline were out, it would have selected William Landers over Bruce Carr. As Respondent states (Br. 193), discrediting Farr's denials of a coverup leave Bruce Carr as ''the only applicant meeting the minimal standards for the position.'' Finding merit to complaint paragraph 11 respecting the A class welder position, I find that Respondent Farr violated Section 8(a)(3) and (1) of the Act by failing and refusing to promote Bruce Carr to that position effective June 27, 1988.

d. *August 24, 1988 warning for dishonesty*

(1) Evidence

Complaint paragraph 12(a) alleges that on or about August 24, 1988, Respondent Farr issued a written warning to Bruce Carr for ''dishonesty.'' (G.C. Exh. 22.) In its answer (R. Exh. 9), Farr admits this factual allegation. (Complaint par. 17 alleges the act as violative of Sec. 8(a)(1) and (3) of the Act.) Oddly, ''dishonesty'' is not one of the 45 specific offenses listed in the employee handbook under the section for discipline (G.C. Exh. 5 at 19–20) or Farr's December 1987 Personnel Policy rules (G.C. Exh. 48). For some reason ''dishonesty'' is relegated to the section for vacation pay (in the handbook) where certain language renders employees ineligible for receiving prorated vacation pay if they are terminated for certain ''serious'' offenses, including dishonesty (id. at 12).

Although the record evidence on this allegation is substantial, I shall abbreviate the summary somewhat even though the issue is close. On August 24, 1988, Respondent Farr issued Bruce Carr two written warnings—one for absenteeism (G.C. Exh. 15; 3:328; 8:1410–1412) and the second for dishonesty (G.C. Exh. 16; 3:327; 8:1412). Although the Government does not allege the absenteeism warning to be unlawful, the two warnings are related. The Company's statement on the attendance warning reads (G.C. Exh. 15):

> Since receiving 1st written warning for excessive absenteeism, you have been absent 3 days, left early 3 days, and have been tardy 2 days. On 8/19/88, you left work after telling your supervisor your child was sick. You later admitted to management you went to a private club on that date. You were at the club during your regularly scheduled work hours. This is considered as an irresponsible absence as defined in the written absentee policy.

The violation date is shown as August 19. The decision portion of the document warned Carr that it was a ''final written warning'' for absenteeism, that his job was in jeopardy, and that a single absence within a 3-month period would be reason for termination.

The second warning, listing a violation date of August 23, 1988, at 4:30 p.m. in the ''Front Office,'' bears the following ''Company Statement'' (G.C. Exh. 16):

> On 8/23/88, you were involved in a meeting to discuss the circumstances surrounding your absence on 8/19/88. Management informed you at the beginning of the meeting that dishonesty on your part would be reason for disciplinary action. You lied in response to direct questions concerning our investigation. Upon learning that management already had the facts, you finally admitted your dishonesty.

In the ''Employee Statement'' portion Carr wrote (G.C. Exh. 16; 3:327):

> I disagree with time in meeting that I was told that dishonesty would be reason for disciplinary action.

The ''Warning Decision'' portion of the document warns Carr:

> This is a final written warning. Any further policy/-performance violation within the time limits outlined in our corrective discipline policy will be reason for termination.

In the section for itemizing all previous warnings, Farr lists the ''1st written warning'' of January 19, 1988,—the one I have found was tainted by union animus and pretextual. The January warning could not be found unlawful because it issued outside the limitations period. Consequently, the January 1988 written warning survives despite being unlawfully motivated and pretextual.

The only factual dispute about the August 23 investigatory meeting concerns the moment when Pickney first informed Carr that any dishonesty would be reason for disciplinary ac-

tion. In a file memo (R. Exh. 28) Pickney prepared after the meeting (8:1409) he fixes the time as the beginning of the meeting. That is his (8:1405) and Moring's (9:1752) testimony at the hearing. At another point Pickney testified that he told Carr to be honest, and only when counsel asked whether Pickney advised Carr of the consequences of failing to do so did Pickney add the part about potential discipline (8:1411). The honesty admonition, without the discipline addition, is consistent with Carr's version—that discipline was not mentioned until later, and at the beginning Pickney may have cautioned Carr to be honest in his answers (4:504–505). Carr also admits that Moring, in escorting him to the meeting, could have told him to give honest answers, although he does not recall Moring's doing so (4:503–504). Moring recalls that he did (9:1751).

I find that Moring did give the honesty caution as he escorted Carr, that Pickney gave an honesty caution when he opened the meeting, but that, consistent with the qualification Carr wrote on the warning paper the next day, nothing was said about discipline until Carr had given his initial story—a story he changed when it became apparent Farr knew the facts and Pickney advised him that dishonest answers could result in disciplinary action.

Now for the events of August 19, 1988,—a Friday. The second shift, on which Carr worked, normally ended at 12:30 a.m. (4:501; 11:2083), but, Carr concedes, the shift was scheduled to work overtime until 2:30 a.m. (4:494, 501.) Supervisor (Ronald) Keith Bowman asserts the time was 2 a.m. (11:2082). Pickney testified that Farr was behind on production (8:1404). About half a mile from Farr's plant is a private club, the Eagles Club or Eagles Lodge (8:1402). Carr is a member of that club (4:478). Friday nights, Carr concedes, are well attended at Eagles (4:478). Kenneth Heindselman also worked in Hi-Bay on the second shift under Supervisor R. Keith Bowman (11:2079).

About 8 p.m. that Friday evening, Bowman testified (11:2079), Heindselman came to him saying he had to go home because he felt sick in his stomach. Bowman authorized Heindselman to leave after bringing his timecard to Bowman. When Heindselman did not return in a few minutes, Bowman went to find him. Bowman observed Heindselman and employee Delton Cahoon talking with Bruce Carr at Carr's work station. Bowman heard one of the group exclaim ''Well, all right,'' and they all were laughing. At that point the trio saw Bowman, Cahoon departed for his own area, and Heindselman dropped off his timecard with Bowman (11:2079–2081).

The evening meal break begins at 8:30 (3:324). About 5 minutes before the 8:30 p.m. supper break, Bowman testified, he heard someone—he did not recognize the voice—page Carr. Bowman was in the front office (at the main plant, apparently), at the blueprint machine. Under Farr's general practice, supervisors do the paging, and Bowman knew the pager was not 2-D Supervisor Raymond Copeland (11:2077–2078).[27] Considering this situation strange, Bowman returned to Hi-Bay where Carr informed him he had received a call from his son's babysitter that his child was running a high fever and because of that he needed to leave. ''Okay,'' Bowman said, and Carr left (11:2078–2079). After supper Bowman, thinking that events were suspicious, asked a group of employees whether anything was happening that night at the Eagles. ''Yeah,'' Bowman was told, ''there's a huge party going on down there tonight.'' (11:2080–2081.)

After his shift ended at 2 a.m. (on Saturday morning), Bowman drove to the Eagles' parking lot and, counting 72 vehicles still there, found two he believed were those of Carr and Heindselman parked closer to the building than most of the others. Recording the license plate numbers, he confirmed on Monday that the numbers belonged to the vehicles Carr and Heindselman drove to work. Bowman reported the information that Friday, Saturday, and Monday, to Pickney (8:1402–1404: 11:2083–2086, 2214–2215). That Friday night, after a call from Bowman around 9 p.m., Pickney drove to the Eagles and observed that about 70 vehicles were parked there all the way out to the street (8:1402–1403). Pickney left without going inside the club (8:1403), apparently because he is not a member (9:1647).

Carr is a single parent with custody of his then 3-year old son (3:324–325; 4:495). Insisting that his son did have a fever of 100 degrees or more by the time he arrived at his (Carr's) mother's,[28] Carr testified that he gave the child some Tylenol by 9 or 9:30 p.m. When Carr's mother arrived home about 11 p.m. from her own job, Carr testified, the child, now sleeping, felt cool to the touch. Rather than returning to work, or calling Bowman, Carr—figuring he would be charged with half a point for absenteeism anyhow—went to the Eagles where he had ''a beer or two.'' Carr denies leaving work with the intention of going to the Eagles Club rather than to care for his son (3:324–325; 4:481, 495–502).

On Tuesday, August 23, Pickney and Moring first interviewed Heindselman who, after initially denying the episode, admitted that he went to the Eagles Club.[29] Farr issued Heindselman a correctional interview for an ''irresponsible absence'' in the first step of the absentee policy, and a first written warning (G.C. Exh. 24) for lying to management (3:187–191; 8:1404–1407). Counsel represent that Heindselman filed no charge (3:188, 250).

At his interview Carr concedes he first said that after picking up his ill son he had remained home all night. When Pickney warned of discipline, Carr admitted that in fact he had left home and gone to the Eagles Club about 11 p.m. after getting his son to sleep and his fever down (3:326; 4:478, 506). Carr denies that he did not divulge the truth until Pickney asked about his vehicle and license number (4:507–508). Pickney (8:1408) and Moring (9:1752) testified that Carr did not admit his visit to the Eagles until after Pickney asked about the vehicle and license number. On this point I credit Pickney and Moring. In any event, Carr concedes that he initially lied to Pickney and Moring (4:507).

Although I need not dwell on whether Carr or Heindselman had different plans from the beginning, I note Carr testified that Heindselman, that August 19, had come by Carr's welding booth between 6 p.m. and 8:30 p.m. and said he was leaving work because he was sick (4:477, 492). Although there is a question whether Carr signed Heindselman in on Carr's membership at the Eagles when Carr arrived after 11 p.m. (4:478–479, 490–491), Carr testified he was

[27] Quality Control Inspector Bobby Loueallen did the paging (5:916; 11:2080).

[28] Carr lives next door to his mother (4:473).

[29] Although Pickney says the day was Monday, the date stated on various exhibits (G.C. Exhs 16, 24; R. Exh. 28), August 23, 1988, was a Tuesday.

surprised to see Heindselman there and asked him if he had gotten well. Heindselman, Carr testified, laughed (4:493). Carr thinks that some members of the day shift may have been there, but no others from the night shift (4:491).

When Carr met the next day, August 24, with Pickney and Moring to learn what decision Farr had made, they said they were going to give him a warning for irresponsible absence. Pickney then gave him the warning, which Carr signed (G.C. Exh. 15). After Carr signed it, Pickney pulled out the second one, saying, ''We're going to give you this warning for being dishonest.'' On reading it (G.C. Exh. 16) Carr determined that the statement incorrectly placed the caution about possible discipline for dishonesty at the beginning of the meeting. Carr noted on the form his disagreement with the sequence (3:326–328). Moring concedes he did not ask Carr on the spot how Carr could be mistaken about the sequence, and he does not recall whether Pickney said anything. Moring explained his silence on the basis that Carr knew he had been told, that Carr was entitled to write his disagreement on the form, and that there was no point in arguing about it (9:1756–1760). Other than testifying that both he and Moring were present with Carr (8:1412), Pickney does not address the point or take issue with Carr's description of the meeting.

The General Counsel contends, in effect, that there is an absence of precedent. Pickney testified he does not recall any employees besides Carr and Heindselman having been issued a dishonesty warning (3:182). They do not count, as the General Counsel argued, because both were IUE supporters. Certainly there was knowledge as to Carr, and Pickney admits he knew that Heindselman wore IUE insignia (3:183–184). Pickney prepared a document (R. Exh. 2) listing all written disciplinary actions since the 1986 inception of the plant to about March 1989 (8:1335–1349). The list shows that over two dozen now inactive employees were disciplined, including five discharged, with 41 of the current employees having been disciplined (8:1337–1338). As the list reflects, attendance warnings are included. The list does not show which ones wore IUE insignia and which ones did not.

One of the inactive employees, an assembler named Julie Gulley, is shown as receiving a first written warning for ''Dishonesty'' on April 19, 1988 (R. Exh. 2; 8:1346). On cross examination by the General Counsel, Pickney admitted that the actual warning (G.C. Exh. 54) to Gulley says, rather than dishonesty, ''Making false, malicious statements'' (9:1627–1628). The type of violation charged on the warning form reads, in full (G.C. Exh. 54): ''Making false, malicious statements concerning the company. (Company Rule 13—P. 14, Employee handbook.)'' Rule 13 reads (G.C. Exh. 5 at 19): ''Making false, vicious or malicious statements concerning any employee, the Company or its products.'' The ''Company Statement'' portion reads (Gulley initialed and signed that she concurred) (G.C. Exh. 54):

> You admitted making untrue statements about management. Due to these statements, there was a disruption of the entire department. You said these state- [sic] were made in error. If this is true, then it is negligence and carelessness on your part in making such statements.
>
> If allowed to continue, statements such as you made, could be very damaging to the Company in the form of employee trust and morale. It is very important that you be honest with your self and your co-workers when quoting management.

Of course, a false or untrue statement does not necessarily involve dishonesty. Given the handbook's failure to list ''lying to management'' as one of the specific disciplinary offenses on pages 19–20, Pickney apparently preferred to list the ''dishonesty'' reference in the vacation section of the handbook rather than the false/untrue statements language of Gulley's warning. Rule 13's ''concerning any employee'' would seem to be elastic enough to cover an employee's lying about his own conduct to management. Moreover, the caveat following the handbook's listing of offenses leaves plenty of room for Farr to improvise: ''not intended as all inclusive.'' Such matters are beyond our focus here, however. Under the law Farr, if it needed to, was free to create (even after the fact) a new rule just for Carr—so long as Farr did not do so to punish Carr for his activities protected by the statute.

Although the Gulley matter can be argued both ways, as precedent or as not being an example of dishonesty, the pertinent inquiry on disparity is whether the General Counsel has shown examples of dishonesty (or lying to management) wherein Farr failed to impose discipline, or imposed a lighter discipline than was given Carr. Treating like cases differently is the test of disparity. The General Counsel offers no evidence of such disparity.

(2) Analysis and conclusions

Observing that Carr was truthful after he was cautioned about potential disciplinary action, the General Counsel appears to argue that such fact insulates Carr from discipline for lying at the beginning of the interview (3:252; Br. 55). However, the General Counsel seems to combine a second ground with that contention, the second ground (or aspect) being that Respondent Farr imposed two warnings for a single offense (in order to ''speed up'' the process of terminating Carr), and that these grounds, together or perhaps even singly, show unlawful motivation. I disagree. I agree with Farr that there were two events: (1) an irresponsible absence (not in contention) and (2) a lie in the initial response at Farr's investigatory interview. The evidence fails to show that Farr, in any similar situation, issued only a single warning.

Before discussing the crucial question of motive, I shall address another contention of the Government—that Pickney's method of delivering the warnings (waiting until Carr had signed the first one before handing him the dishonesty warning) further evidences unlawful intent (Br. 55–56). The General Counsel does not pause to articulate this contention. Presumably the Government's contention, if articulated, would be that Carr would not have signed the absence warning had he been aware there was going to be a second warning. Carr did not so testify, and the facts of the absence are not in dispute. I find this contention frivolous.

The real question is whether Farr seized on Carr's initial lie to retaliate against him because of his IUE activities. There being no evidence that Farr openly expressed such a motive to Carr or others for the second warning, the General Counsel must fall back to other evidence in an effort to establish a prima facie case. I already have found that Farr was

unlawfully motivated against Bruce Carr in (1) the January 1988 appraisal and low production warning and in (2) denying him the welder A position in June 1988. That existing condition of animus carries over to this event. Moring testified that his decision to impose the warning was unaffected by Carr's union activities (9:1756). I do not believe Moring.

However, there is no evidence of disparity. Thus, the mere fact Farr's first example of imposing discipline for ''dishonesty'' involves two union supporters means nothing without evidence showing that in the past Farr either ignored ''dishonesty'' or imposed a lighter penalty than that which it administered to Carr. The event at issue was Farr's first occasion to be confronted with a question of lying to management, or dishonesty.

We are left with the question of whether Farr's animus against Farr is sufficient by itself to enable the General Counsel to carry the Government's threshold burden—establishing a prima facie case that the August 19 ''dishonesty'' warning was unlawfully motivated.[30] The answer appears to be yes. See *GHR Energy Corp*., 294 NLRB 1011 (1989). I note, however, that in *Wright Line* itself the General Counsel showed both animus and disparity. *Wright Line*, 251 NLRB at 1090.

I now turn to determine whether Farr discharged its burden of persuading that it would have warned Bruce Carr even if he had not been an IUE supporter. Farr's burden is to persuade by a preponderance of the evidence. *Regency Memphis*, 296 NLRB 259 (1989); *Delta Gas*, 282 NLRB 1315, 1317 (1987).

Farr reviews the evidence generally, but fails to articulate how it satisfied its burden of demonstrating that it would have issued the dishonesty warning even in the absence of any union activities by Bruce Carr. Nevertheless, the record reflects these points. *First*, Farr has a progressive disciplinary system and a history of using it. *Second*, 4 months before Carr's incident, Farr issued a first written warning to Julie Gulley, an assembler, for making untrue statements. Although not squarely on point, the Gulley incident is analogous precedent because, as seen from the warning form (G.C. Exh. 54), the event had the appearance of maliciously false statements and Farr cautioned Gulley to be honest thereafter. The evidence does not show whether Gulley openly supported or opposed the IUE.

Third, lying to management at the beginning of an investigatory interview, after twice having been cautioned to be honest, is a serious matter—at least where the event being investigated is, as here, a matter of substantial importance.[31] *Fourth*, the nature of the penalty gives rise to contrasting views. On one hand, Farr did not attempt to convert the penalty from a final written warning to a discharge by classifying the conduct as so serious as to justify discharge based on the language of the vacation provision. Nor did Farr enhance the penalty to a suspension, a penalty available in lieu of a written warning. In short, Farr followed the steps of its normal progressive disciplinary system, and, by not imposing a more severe penalty than normal, Farr did not overreach.

On the other hand, Farr could have imposed a lighter penalty in view of Carr's admitting his lie and then confessing what he had done. Exceptions to the level of discipline are expressly authorized in paragraph 1 of Farr's December 1987 personnel policy rules (G.C. Exh. 48). And recall Pickney's May 18, 1988 memo (G.C. Exh. 18) to Moring and Tinch that James Chapman (who was opposed to the IUE) should be discharged for a May 16 absence unless an ''exception'' was made. Shortly thereafter Chapman, rather than IUE supporter Bruce Carr, was promoted to leadman. Perhaps a ''second'' written warning, rather than a ''final,'' could have been issued to Carr. Farr uses recorded oral (''verbal'') warnings, and it could have done so here in light of Carr's ultimate cooperation. There is no evidence Farr weighed lighter penalties such as these possibilities because of Carr's ultimate cooperation.

Although the issue is close, I conclude that the evidence demonstrates Farr would have given Bruce Carr the dishonesty warning it did even if he had not been active for the IUE. The investigation involved a matter of substantial importance. Carr's initial lie, if treated with a lighter than normal penalty by Farr, possibly would not have deterred Carr from lying on future occasions when, unlike here, Farr might not be armed with the truth. In these circumstances, Farr's response appears reasonable. Accordingly, I shall dismiss complaint paragraph 12(a).

e. *Bruce Carr discharged October 16, 1988*

(1) Introduction

The warnings Bruce Carr received on August 24 left him in a precarious position, for each was a ''final'' written warning (G.C. Exhs. 15 and 16) with the next disciplinary step being discharge for either an attendance problem or a performance/policy violation. (8:1412–1413, Pickney.)

Lest it be concluded every caution to Carr was a written warning, I need to back up to July 5. On that date Carr was counseled that he needed to increase his production speed on welding tube sheets. As with most issues in the case, some of the facts are disputed. Glen Moring testified that he and supervisor Raymond Copeland met with Carr on July 5 concerning the fact Carr, about twice in late June and early July, took about 16 hours to weld a tube sheet, when the allotted time was 9.5 hours. Although the discussion with Carr did result in Moring's increasing the allowed time to 10 hours, the purpose of the meeting, Moring testified, was to advise Carr that 16 hours was unacceptable (9:1732–1742). Moring prepared a memo (R. Exh. 23; 8:1387; 9:1640) concerning the matter which he forwarded to Pickney for Carr's personnel file. According to Moring, he informed Carr the meeting was a ''verbal warning,'' although he concedes that his memo does not so state, that he did not tell Carr he would memorialize the interview with a memo to Carr's file, and that Carr did not ask what Moring meant by a verbal warning (9:1742–1745, 1807–1808).

Although Carr denies he was told the nature of the meeting was a verbal warning (12:2541–2542), Carr concedes (during rebuttal) he understood Moring was unhappy with

[30] *Wright Line*, 251 NLRB 1083 (1980).

[31] Hi-Bay was behind on production and employees were working overtime in an effort to meet production demands. Supervisor Bowman was concerned that Carr and Heindselman left early to attend a big Friday night party at a nearby club. Heindselman laughed to Carr about his illness excuse. Even if Carr's excuse was valid (a point I need not resolve), at 11 p.m.—when his fellow workers had another 3 to 3.5 hours left to toil on a shift of scheduled overtime—Carr chose to join the festivities at the Eagles Club rather than returning to Farr to help his fellow workers. Bowman needed all his welders. Defection in the face of heavy production demands was a serious matter.

Carr's 16 hours and wanted Carr to improve his time (12:2570, 2571). Asked whether he understood he was subject to further disciplinary action if he did not improve, Carr testified that ''you always have that, you know.'' (12:2571.) Carr testified that his time was longer than Roy Cline's on the day shift on the tube sheets because the day shift had helpers for this and he and the night-shift welders did not (12:2524–2527).

I credit Carr in his denial that Moring or Copeland told him he was receiving a verbal warning, but I attach little weight to the matter of the helpers because Carr did not testify that he made that argument to Moring and Copeland on July 5, 1988.

That brings us to the August 27, 1988 memo (G.C. Exh. 12) submitted by supervisor (Ronald) Keith Bowman to Hi-Bay Manager Glen Moring and given to Pickney for Carr's file. (1:89–92; 8:1413; 10:1948, 1957.) Bowman testified he first prepared the memo about a quality problem by Carr (improper assembly, incorrect positioning of a support plate, and a missing weld on four leg supports) and that he then called Carr into the Hi-Bay office and read the memo to him. He reminded Carr that about 2 weeks earlier Moring, speaking to both shifts, had complained about brackets on the first S & S module being 1 inch off position.[32] Moring told the employees that quality had to improve or write-ups would be issued.

Bowman told Carr there was no excuse for such mistakes as Carr's as much time as Carr was taking to do the work. Carr explained that a poor blueprint caused the first mistake, that he picked up a wrong part, causing the second, and that the third (the missing weld) he overlooked because of the welding technique he used. Bowman told Carr he could not ''procrastinate'' any longer on giving him a written warning (10:1949–1953). By no further ''procrastination,'' Bowman apparently meant that the next time it would be a written warning. Although Pickney agrees (9:1658) that the memo does not state it is a ''verbal warning,'' Pickney (1:89; 8:1431) and Bowman (10:1950–1951; 11:2139–2140) so consider it. Carr did not address this meeting, or the memo, when he testified on rebuttal. I accept Bowman's uncontradicted testimony.

As noted much earlier in this decision, Pickney testified that Farr's policy handbooks and manuals made no mention of ''verbal'' (oral) warnings (9:1701). The parties stipulated that the August 27, 1988 (verbal warning) memo of Bowman was not offered in evidence at the December 16, 1988 unemployment hearing.[33]

Pickney testified that the August 27 memo, not being part of Farr's formal disciplinary procedure, was not used in the formal three-step disciplinary procedure in terminating Carr, and the issue before the ESD was misconduct (1:144–145). Farr's counsel represents that the August 27 memo was not offered before the EDS because the memo was not part of the formal disciplinary process and because the issue there was whether Carr's actions amounted to ''misconduct'' under Arkansas law (1:146–148), whereas the issue here is whether there was unlawful discrimination (9:1654–1655). I agree with Respondent Farr that the memo (as Bowman's testimony) is relevant here regardless of whether offered before the ESD. Pickney testified that Bowman's August 27 memo, although not a step in the formal disciplinary procedure, nevertheless was looked at, and considered, in the process of deciding to discharge Carr (1:89; 8:1414–1415, 1431). The General Counsel apparently seeks to stress that Bowman's memo was not offered at the ESD hearing even though the ''cause'' of Carr's discharge was in issue (Br. 34). The General Counsel's argument appears to be that Farr did not in fact rely on or, apparently, even consider the August 27 memo when deciding to discharge Carr (1:96; 2:149; 9:1652).

This issue is a ''tempest in a teapot.'' As we are about to see, Farr in fact referred to the August 27 memo on the face of Carr's termination step notice. That notice is given on Farr's standard written warning form. The events leading to Carr's discharge occurred the evening of October 3, 1988. Carr was fired the evening of Tuesday, October 11. The warning's ''Company Statement'' reads (G.C. Exh. 11):

> On 10/3/88 you completed the #8 Stewart & Stevenson transition. The welds were of very poor quality and had to be reworked. This included grounding off and re-welding. This resulted in several hours of rework time and a loss of production. You have been warned about the quality of your work in the past.

The ''Warning Decision'' portion of the written warning reads:

> You have reached the final step of disciplinary action under our progressive discipline policy. Along with your past verbal warnings, 1st written warning, and Final written warning, Management views this latest example of poor work quality as reason for discharge, effective 10/11/88.

Previous warnings are listed as follows: A first written warning on January 19, 1988, a ''final'' written warning on August 23, 1988, and a ''verbal'' with ''No formal disciplinary action'' on August 27, 1988. The signatures of Pickney, Gardner (the plant superintendent), and Supervisor Bowman are dated October 11. Carr's signature is undated at one point (acknowledging that he has read it) and dated October 13 at the ''Employee Statement'' where he wrote, ''Information incorrect.'' As he explained at his December 16 ESD unemployment compensation hearing, Carr declined to sign on October 11 because Pickney did not have a copy for Carr. At Pickney's suggestion, Carr returned on October 13 to sign and receive his copy (R. Exh. 71 at 37).

(2) Welding terms and processes

Because welding terms appear frequently in the testimony about the evening of October 3, I shall discuss the terminology before summarizing the evidence. To gain a better understanding of the evidence it is helpful to consult some of the standard welding texts such as those I cite.

Of the witnesses, the person most knowledgeable about welding systems and terms is Gary C. Enders. Although not a welder by trade or a production welder, he does some

[32] Bowman's mid-September timeframe, given on cross-examination, perhaps refers to another meeting. (11:2141.)

[33] Farr protested the Arkansas Employment Security Division's (ESD) initial decision to grant Carr unemployment benefits based on a November 10, 1988, finding that ''he had been discharged for reasons which do not constitute misconduct connected with the work.'' (R. Exh. 71 at 3, transcript of ESA hearing.)

welding almost daily (9:1600, 1612–1613). Enders, the welding products manager of Standard Welders Supply Company (Standard), has been a member of the American Welding Society (AWS) for 15 years. At the annual meetings of AWS, Enders attends most of the technical sessions ranging from nondestructive testing to weld inspection (9:1600–1601, 1613–1616). Respondent Farr is one of Standard's customers (9:1601, 1621).

Of the several welding process he named, Enders testified that Farr, in 1988, was using primarily MIG, TIG, and some flux core wire welding with the shielding gases being mostly argon and carbon dioxide mixtures (9:1601–1602). The mixture Standard supplied Farr in 1988 was 75 percent argon and 25 percent carbon dioxide, Enders testified. (Generally in the record carbon dioxide is referred to as CO2.) The purpose of that percentage mixture is to achieve good penetration with a minimum of spatter. The CO2 achieves greater penetration but produces more spatter. Enders testified that either gas can be used independently for welding, and a change in the percentage ratio of the two gases will not cause porosity because they ''both'' are considered inert gases (9:1605–1606, 1617–1618). Equipment called a mixer (the ''ratio controller'') controls the percentage mix of the gases (which are stored in a liquid state). When mixed, the mixture flows through a vaporizer (converting the liquid to gas) and into the pipeline system which carries the gas, under pressure, to the welding machines. (9:1602–1603, 1616–1617, Enders.) ''Only high-purity, dry inert gas ('welding grade' gas) should be used in MIG welding. Impure or wet gas will degrade weld quality.'' *The Procedure Handbook of Arc Welding* at 9.3-7 (12th ed., 1973, reprinted annually by The Lincoln Electric Company) (Lincoln Electric, herein).

Enders' description appears generally consistent with the welding texts. However, although argon is an inert gas, carbon dioxide, a chemical compound, is a reactive gas rather than an inert gas.[34] Respecting welding with all argon or CO2, I note that Sacks writes (Sacks, id. at 344):

> Pure argon is seldom used in the GMAW welding of such materials as carbon steel since it causes poor penetration, undercutting, and poor bead contour.

That would suggest that, at least for welding on carbon steel, undercuts could result if the gas mixing apparatus malfunctioned and delivered pure argon rather than 75 percent argon and 25 percent CO2. On cross-examination, Enders concedes that a malfunction resulting in a pure gas would create a problem (9:1618).

Carbon hardens steel. The more carbon the steel contains, up to a maximum of 2 percent, the harder and stronger the steel. Koellhoffer at 33. Those steels whose carbon content does not exceed 0.30 percent are classified as low carbon steels, and are widely used for industrial fabrication. Sacks at 46. Welder Ray Smith testified that the steel used at Farr is ''hot roll'' steel. (5:774–775, 832.) ''Cold roll'' (the mild steel Ray Smith prefers to weld) and ''hot roll'' refer not to the carbon content but to the finishing process. Sacks at 38, 46; Lincoln Electric at 6.1–10, 11.

Although GMAW (gas metal arc welding) is the name preferred by the American Welding Society (AWS) for this welding process,[35] the name still most commonly used by welders and others in the industry is the acronym MIG, an abbreviation of metal inert gas.[36] Like MIG, the term TIG (tungsten inert gas) is a throwback to its early process. This welding process was developed in the early 1940s for use with the lightweight metals of the aircraft industry. Kellhoffer at 271; Audel at 248. The preferred term of the AWS is gas tungsten arc welding, or GTAW. Kellhoffer, id.; Audel, id.; *Welding Handbook* at 78. Some of the welder witnesses also refer to TIG as heliarc (5:763–764, 809–811) and MIG as short arc or wire welding (3:390, 435; 5:810–811). ''Short arc'' refers to one type of MIG welding. Koellhoffer at 343; Sacks at 333; Lincoln Electric at 5.4–3. ''Wire welding'' refers to the equipment that can be used—an apparatus for the continuous feeding of welding wire through the nozzle of the welding gun being used by the welder. Koellhoffer at 350; Audel at 269–270; Sacks at 337–340. It appears that Farr uses such continuous welding wire feeder equipment.

Enders testified that the gases are used to shield out the atmosphere from the weld (9:1602). The primary purpose of shielding gases is to protect the molten weld metal from contamination and damage by the surrounding atmosphere. Koellhoffer at 345; Sacks at 341; *Welding Handbook* at 131. When molten, most metals combine with oxygen and nitrogen to form metal oxides and nitrides. This contamination can produce, among other defects, *porosity*. *Welding Handbook* at 131. As Sacks tells us, oxygen combines readily with other elements in the weld pool [the pool of molten metal] to form unwanted oxides and gases. Sacks continues, at 392 (emphasis added):

> The oxygen combines with iron to form compounds which are trapped in the weld metal and reduce its mechanical properties. Free oxygen also can combine with the carbon in the metal to form carbon monoxide. If carbon monoxide is trapped in the weld metal as it cools, it collects in pockets. This causes *porosity* in the weld.

As a substantial percentage of air, nitrogen also is a serious risk for welding because, Sacks explains (id.), it forms compounds of nitrides. These compounds cause hardness and lead to cracks. In large amounts, nitrogen also causes serious *porosity* in the weld metal. Sacks, id.

Porosity, then, is one of the principal defects which can result from contamination of the weld. Sacks calls it the most common one. Sacks at 361. As the term suggests, porosity consists of types of gas pockets or holes, in all shapes and sizes, but normally visible round holes. Koellhoffer at 14–15. Porosity does not necessarily mean the weld is a failure, and small amounts of porosity may be acceptable. Location and

[34] L. Koellhoffer, A. Manz, and E. Hornberger, *Welding Processes And Practices* 345–346 (1988, John Wiley & Sons) (Koellhoffer); R. Sacks, *Essentials of Welding* 343–345 (1984, Bennett Publishing Company) (Sacks); and 2 *Welding Handbook* 132–133, 136 (7th ed., 1978, American Welding society) (Welding Handbook).

[35] Koellhoffer at 333; *Welding Handbook* at 114. The complete name is ''inert-gas-shielded, metal-arc welding.'' Sacks at 328.

[36] Koellhoffer at 333; *Welding Handbook* at 114; Sacks at 327; J. Brumbaugh, *Audel's Welders Guide* 265 (rev. ed. 1986, Macmillan Publishing Company) (Audel). At some places in the record a witness is recorded as using the word ''inner'' for ''inert.'' See, for example, 3:390; 4:517; and 9:1601. If not spoken distinctly, the two words can sound alike.

purpose of the weld are critically important. Nevertheless, in almost every welding situation porosity will cause trouble and is therefore a ''No-No.'' Koellhoffer at 14.

Porosity can result from many causes. Some of the causes are traceable to defects in equipment or in the shielding gas system. Sacks at 361. Most welding defects (such as porosity), however, result from welder error. Koellhoffer at 15. Failure of the welder to clean the welding gun nozzle is a defect that Enders lists, and holding the torch at an improper distance is another that can cause porosity (9:1606). Excessive travel speed (the rate at which the weld is laid) is another factor that causes porosity. Koellhoffer at 15. Carr agrees that pushing the welding wire too fast can cause (unspecified) problems (4:703).

Undercutting, another defect prominently mentioned in the evidence, is the cutting or melting of a groove in the base metal along the edge of the weld. Koellhoffer at 17; Sacks at 361; Bruce Carr (3:302–303; 4:591–592, 695). There can be several causes, with excessive electrical power, or heat, being the usual cause. Enders (9:1610); Sacks at 361. Carr agrees that excessive amperage can cause undercutting (id.). As Enders observes, the operator (welder) controls both amps and volts by two controls on the welding equipment (9:1610–1611). It is clear from the record and the welding texts that proper welding is a complicated process.

Humps in the weld are another problem described in the record. They appear on photographs in the record (R. Exh. 90h, g, p) as accumulations of welding metal at stops and starts in the welding bead (5:929–930; 10:2021–2027). Other than leaving the weld with a poor appearance, it is not clear that such humps indicate any structural defect in the weld. As Carr acknowledges, however, the goal is to lay as long a continuous weld bead as possible before the welder must stop to pick up and move position (4:530–531). Usually this is a bead of 2 to 3 feet when he is working on his knees (4:531–532, 700–701). Even when the welder is experienced, Carr testified, stops and starts usually can be seen, and especially so when the welder is experiencing problems (4:702).

Enders testified that humps can be caused by any of several factors, including traveling too slow (the rate of moving the torch) and using current (amps) set ''too cold.'' The latter results in poor penetration with the weld metal piling up in the weld groove rather than penetrating into the base metal. The welder controls the travel speed, of course, and as mentioned, Enders testified that the welder also operates the controls for both amps (determined by the wire speed the welder uses) and volts (adjusted by turning a knob on the power supply). (9:1610–1611.) Carr agrees as to the welder's control of the electrical adjustments (4:592, 694).

Carr testified that inconsistencies in the weld gap (the groove for depositing the weld) can result in humps or weld build-up when the groove narrows. This results when the welder, his travel speed adjusted to the wider portion, tends to linger momentarily (depositing the hump) as he reaches the narrow width and before he can adjust to the more narrow width (4:530).[37] Former QC inspector Loueallen supports Carr. Loueallen testified that the weld humps in a prominent photograph (R. Exh. 90p) are caused by stops and starts and that such humps were common and acceptable on those units because of the gaps they had (5:930). Carr concedes that some of the humps in the photograph (R. Exh. 90p) would have to be repaired (12:2579). One reason of the increase in his stops and starts, Carr testified, was his attempt to check for pinholes (gas bubbles) after he discovered he was having a problem with porosity. I shall discuss that later.

The subject of weld gaps must be covered in more detail later. At this point it is sufficient to note Carr's testimony that a weld gap larger than specified requires the welder to slow down and make multiple passes, as many as 7 or 8, to fill the groove with the weld metal and to come back over all of it with a cap weld. (3:342-343; 4:590–591; 12:2577–2578.) Carr testified that the wide gap problem, and the welding technique necessary to fill such a gap, makes it more likely that the welder will leave high spots and low spots in the weld (4:590). Former QC inspector Loueallen testified that to fill in a wide gap the welder lowers the heat, travels slower, and fills in the gap by building up the welding metal (5:944). However, welding with lower (electrical) heat creates a ''very unattractive weld,'' risks depositing ''cold lap,'' achieves poor penetration, and produces a much weaker weld. ''You just run the risk of problems.'' (5:925–926). Aside from the unattractive weld, I understand Loueallen to be saying that the process risks having cold lap, poor penetration, and a weaker weld, and not that such are the inevitable result of having to fill an oversize gap.

As we shall see, the evening of October 3 Carr's task was to weld steel plates together. A metal brace was tacked underneath the two joint plates to serve as a ''stiffener.'' The welder's job was to weld not only the joint of the top two plates, but to have the weld penetrate into the underlying stiffener to fuse the three plates at that welded point.

Cold lap is another name for lack of fusion. Sacks at 361. Lack of fusion usually results from low heat or a combination of that with welder error, such as improper torch handling or traveling too fast. Koellhoffer at 16; Sacks at 361. Incomplete fusion is a slightly different problem from inadequate penetration. As Koellhoffer describes, incomplete fusion occurs at the shoulders or sides of the grove, whereas inadequate penetration means there is poor or no penetration at the root (bottom) of the joint. Koellhoffer at 16. Inadequate penetration can result from the amperage being too low or travel speed too fast, among other possible causes. Koellhoffer, id.; Sacks at 360–361.

Spatter is an appearance problem rather than a defective weld. Spatter consists of weld droplets, or BBs, which splatter onto the metal surface adjacent to the weld bead. Enders (9:1605); Audel at 73–74; Sacks at 361. The purpose of using a shielding gas mix of 75 percent argon and 25 percent carbon dioxide is to achieve good penetration with a minimum amount of spatter. CO2, which burns hotter than argon, achieves greater penetration than argon, but CO2 produces more spatter. Enders (9:1605–1606). Argon provides stability as a shielding gas. Sacks at 343. For these reasons, one of the most popular mixtures in the welding industry is 75 percent argon and 25 percent CO2. Koellhoffer at 346.

Gaps and gouging are related items. No prints of welding specifications were identified or offered in evidence even though, as I summarized earlier, the evidence demonstrates that Farr has them. Carr testified that the specifications call for the weld gap to be 1/8 inch (3:334; 4:571). Former QC

[37] ''Fitups must be consistent for the entire joint. . . . Any variations in a joint make it necessary for the operator to reduce the welding speed to avoid burn-through and force him to make time-consuming manipulations of the electrodes.'' Lincoln Electric at 6.2–16.

inspector Loueallen states that the most desirable gap is 3/32 to 1/8 inch (5:943).

If gaps are too narrow, as when the parts to be welded have been butted up to each other in the fitting process, they must be enlarged. The two principal methods of enlarging or creating a gap are by grinding or gouging, and at Farr a welder may take his choice. When defective welds are to be removed and the parts rewelded, the welder again selects either a grinder or a gouger. If there is much to be done, many chose to gouge rather than to hold a heavy grinder. (7:1212, 1222–1223, Witt; 10:1994–1995, Bowman.)

A grinder is familiar enough (Sacks at 105), but gouging is not. Gouging at Farr is done by a process called arc air gouging. As former leadman Richard L. Witt describes, the arc air gouger ''will cut you a weld groove down to your back stiffener.'' (7:1222.) Witt was Supervisor Bowman's leadman on the second shift at the time of our events, but later when the second shift was eliminated Witt was reduced to an A class welder. (7:1203–1205.) An ''arc'' is a sustained electric discharge, and an electric arc can be used for a cutting action. Koellhoffer at 90, 210. The full name for the arc air cutting process is air carbon arc cutting, and is given the letter designation of AAC by the AWS. Koellhoffer at 210.

As Carr describes the procedure, the carbon arc rod is used to heat the metal, and compressed air, activated when the welder pulls a trigger, blows away the molten metal (4:526). The AWS gives a bit more detail (Welding Handbook at 499):

> Air carbon arc cutting is a method for cutting or removing metal by melting it with an electric arc and then blowing away the molten metal with a high velocity jet of compressed air. The air jet is external to the consumable carbon-graphite electrode. It strikes the molten metal immediately behind the arc.

Many of the carbon electrodes are copper coated (Koellhoffer at 213; Lincoln Electric at 13.5–2), and Carr's testimony suggests that the kind he used on October 3 was copper coated (4:527).

After a groove has been created by arc gouging, it must be cleaned before welding can begin. Although Lincoln Electric (at 13.5–2) asserts that an arc-gouged surface ''is clean and smooth and can usually be welded without further preparation,'' Carr testified under cross examination that ''slag, the grind dust, whatever,'' possibly including impurities from the copper coating, would have to be cleaned out very carefully or porosity in the weld can result (4:527). Carr's testimony apparently blends grinding (''grind dust'') with gouging. Based on Carr's testimony, it appears that some cleaning would be necessary to remove any slag, although Carr was not at all sure there would be any copper impurities. Koellhoffer states that the copper coating burns away in the arc. Moreover, ''Copper pickup from copper-coated electrodes does not appear to be a problem.'' Koellhoffer at 216. Any copper impurities that are left apparently can be cleaned away without much difficulty.

Slag is a different matter. Describing slag as some of the metal that is burned but not successfully blown away in the arc gouging process, Carr testified that slag is always present after gouging and that it is difficult to remove (3:341). The welders use wire brushes for cleaning the gouged-out grooves (4:528–529).

One problem the welders complained of frequently in 1988 at Farr was a bad gas mixture, or bad gas. In 1988 Farr converted its welding gas system from each welder using an individual bottle of gas to a common gas source. (3:345, Carr.) Carr's testimony is confirmed by Ricky E. Reeves, the commission salesman for Standard Welders Supply who services the Farr account for Standard. (9:1568, 1583.) Reeves testified that the switch occurred in the summer of 1988. (9:1570, 1584.) In response to complaints of bad gas, Reeves made several trips to Farr in July but never could verify a problem while he was there. (9:1573–1577, 1579–1582, 1593.) Unrelated to the complaints, a number of changes were made in the equipment. Eventually, a larger mixer was installed in October 1988 because Farr had added more (welding) machines, Reeves testified. (9:1578, 1585–1586, 1588, 1591–1592.) By the end of December 1988, Reeves testified, the complaints had tapered off and quit (9:1578, 1593).

Former leadman Richard Witt agrees that Farr had problems with the gas mix as late as September and early October, that at times it ''just didn't burn right.'' But Witt had no problems with pin holes (porosity) because he would just stop welding. Eventually, Witt agrees, the problems stopped about the time, as he understands, a new mixer was installed. He does not recall if it was installed after the October inventory. (7:1213–1214.) Welder Ray Smith fixes the installation date for the new mixer as October, following the inventory, and, it appears, the problems stopped then (5:773–774). That, of course, came after Carr's October 11 termination.

Before the new mixer was installed, the standard method of trying to alleviate the problem was to ''bleed the lines.'' Pickney so testified (2:139) as did Carr (3:347; 4:542), although, Carr testified, some welders did not know to do that (4:555). When Carr raised the problem of bad gas at an employee meeting that summer, Plant Manager Pufahl acknowledged that no one knew what was causing the problem (3:347). In any event, the larger mixer installed in late October eliminated the problem—too late to help Bruce Carr.

The question which arises is whether the gas which leaves the mixer and passes through the vaporizer and into the pipeline system can be good as far as, for example, 9 of 10 welders, but be bad at number 10. Enders testified that as the gas comes from a common storage tank the answer is no (9:1607–1609). Aside from the torch handling, by controlling knobs and adjustments on his welding machine, each welder, Enders testified, can control the quality of his welding. (9:1609–1611.) Carr asserts that problems could arise on one shift and not the other and that the lead person and supervisors speculated that the night shift's using less gas possibly had some bearing. (4:538–539.)

If there can be a gas problem experienced by only one welder, caused by gas becoming contaminated at the welder's machine or from the machine through the gas hose to the torch, that possibility is not developed in the record. Welding equipment and hoses should be of high quality and in good condition to prevent gas leaks. Koellhoffer at 9–10; Sacks at 29; Audel at 75, 271–272. As Koellhoffer writes, at 282:

> Hoses between the regulator and welding torch are the source of most problems. Small holes can develop from contact with hot spatter or metal. Pulling and stretching abuse the hose and can cause cracks. Most hoses are dragged over and around things in the work area. They are stepped on and driven over by trucks and forklifts. Give a bubble test to any hose you suspect of leaking.

Although the foregoing quote is taken from Koellhoffer's discussion of TIG welding, the quoted caution about hoses appears to have general application. A regulator also is used in the MIG process to regulate the gas pressure (9:1605, 1609, Enders); Sacks at 346; Audel at 274. If a gas hose has a leak, presumably that would affect the gas pressure which fact the welder could verify by checking the pressure gauge. Koellhoffer advises that when a system has been inoperative for awhile the welder should purge the system because moisture ''can creep into a well-maintained system through the torch tip, especially when the system is shut down overnight.'' Koellhoffer continues, at 283:

> During the night, or at other times when the temperature may lower, the cold metal of the torch can act to condense moisture up inside the torch body. You may find it necessary to let gas preflow for several minutes to wash out the moisture. On occasion purging preflows for half an hour or more have been needed for critical work.

Before I move to the next topic, one other passage from Koellhoffer about shielding gas is interesting, although apparently not applicable to Farr's central source gas storage (as distinguished from individual cylinders). Koellhoffer at 365, emphasis added:

> Commercial mixtures have tight control of the [gas] percentages. Unless you have precision gas mixture controllers the percentages can change as cylinder pressure shifts. Moreover, the gases may not mix completely *in the gas hose connected to the welding torch.*

(3) October 3, 1988—S & S Unit 8

The evening of Monday, October 3, 1988, Bruce Carr worked on Stewart & Stevenson's Transition Unit 8, part of a large air filtration device, or dust collector, for a turbine engine. (2:141, Pickney; 3:330, Carr; 7:1210, Witt; 10:1990–1991, Bowman.) Farr used heavy steel plates to assemble components for the transition unit in its fabrication department. (2:140–141, Pickney; 7:1222, Witt.) Carr estimates the unit as measuring some 13 feet wide and 9 feet high (3:331; 4:687). Pickney estimates the height at closer to 14 feet (2:133). Bowman seems to raise the height even more (11:2170). In any event, a ladder was used to climb atop for working on the roof section (4:598; 12:2170–2171).

The length estimate is unclear, but a diagram (R. Exh. 35) of the unit (shaped like a pyramid with the top cut off to form a roof) in evidence suggests that the length, whether of side or base, is substantially greater. The dimensions of the sides or base are unimportant, for our focus primarily will be on the roof section. Indeed, use of the terms top, roof, base and the like are rather misleading because they generally were used in the hearing to describe the way the unit sat when Carr welded it rather than its posture when it sits bolted in position in the S & S turbine engine (11:2173–2178). The ''roof'' section is the smallest section of the unit. On October 3 the unit was positioned so that it would appear to an observer as a pyramid shaped unit (with the top cut off so as to form a ''roof'') sitting on the shop floor.

When he came to work the afternoon of October 3, Supervisor Bowman conferred with Danny Tinch, the Hi-Bay dayshift supervisor. Bowman learned that Farr wanted to try to complete unit 8 that evening because the company needed to start work on a high efficiency filter house (10:1991–1992, Bowman). Carr and welder Keith Davidson had been working on unit 8 for 2 days tack welding the components in preparation for final welding (3:332; 10:1991; 11:2071; R. Exh. 88-1). Bowman testified that for the October 3 shift he assigned Carr to finish unit 8 and Davidson to start the high efficiency filter house (10:1992).

As diagrams (G.C. Exh. 43a; R. Exh. 34) reflect, and witnesses agree, the roof section consisted of four panels. The outside edges had to be joined to the side walls by welding, and the two long inside seams,[38] crisscrossing in the center of the roof to give the appearance of four radial seams, had to be welded. A stiffener, a piece of channel iron (2:142; 3:335; G.C. Exh. 43b), was tacked underneath for support. All agree that the weld had to penetrate into the stiffener so as to fuse the three pieces of metal along the welded seams.

There is no dispute that Farr's fabrication department incorrectly sheared the four roof components so that three of the (radial) seams, rather than leaving a 1/8-inch weld gap, butted together, with the fourth seam having an excessive gap. The length and width of the gap are disputed. When Carr arrived at unit 8 at the beginning of the October 3 shift he either found the unit on its side, or had the crane operator so position it, so that Carr, when standing on the floor, could face the roof section. Carr observed soapstone markings pointing to three of the four seams with instructions to ''gouge and weld.'' (3:336; 4:615.)

Although the A class welders on the second shift normally did the gouging, Carr testified, Carr concedes that on occasion he has gouged a grove in butted seams. However, Carr testified, the times he did so previously were on much shorter seams than the ones involved here. (3:335; 4:524–526.) Carr estimates that the fourth radial seam had a gap of 1/2 to 5/8 inch or ''approximately'' 1/2 inch (3:333–334, 406). Supervisor Bowman and Leadman Richard L. Witt dispute this. According to Bowman, he earlier had measured the gaps on most of the 10 (10:1994) S & S transition units and found the gaps to be 3/8 inch (11:2164–2165). Bowman asserts that the 3/8-inch gap was limited to the center, where the four seams join, and extended for about a foot to the right and left of the center, as shown on a diagram he drew (R. Exh. 34), and then tapered ''probably'' to the dimension specified (10:1999–2002).

Carr's diagram shows the gap running the full length of the fourth radial seam (G.C. Exh. 43a), although the one (R. Exh. 68) he drew for his ESD unemployment claim is shown as a different radial, Carr does not recall which one is correct, but he asserts that either accurately represents the problem (3:393; 4:561–1562). Leadman Witt testified that the roof panel had some ''wide'' cracks at one space or another,

[38] Not to be confused with ''inside'' in the sense of the underside or inside the enclosed unit.

and he fixes the separation as 3/8 inch (7:1210, 1225). Carr concedes that on occasion in the past at Farr he probably has successfully welded stiffener-supported 1/2-inch gaps (4:522).

The sequence of events is disputed. Carr testified that after he saw these ''gouge and weld'' problems he spoke with leadman Witt about them. Busy working, Witt told Carr to check with Bowman, which Carr did (3:336). Witt testified that at the beginning of the 4 p.m. shift Carr called him over and showed him the butted seams and ''wide'' cracks in the transition unit (7:1210, 1225). Witt does not disclose what he said to Carr on that occasion.

Leaving Witt and locating Bowman, Carr testified, Carr brought Bowman to unit 8 and showed him the problem. Bowman, Carr testified, said the problem was created by the fabrication department, but to ''Go ahead and gouge them out and do what you've got to do and charge what time you spend on that to 1-S, Fabrication.'' As Carr explains, Bowman meant charging the gouging as rework on Carr's labor card under code number 070 (3:336–337). Carr's list of labor codes shows 070 to be direct labor for ''Rework Labor'' (G.C. Exh. 59). Carr records on his labor card that he worked on the unit (it has a long number) doing gouging, actually labor code 070 (rework labor), from 1918 hours to 2075 hours.[39] (3:337–338). With 18 units after the hour being just under 11 minutes, and 75 units being 45 minutes, we see that Carr recorded a time for rework labor of 7:11 to 8:45 p.m., or slightly over 1.5 hours, and charged to 1-S on his labor card (G.C. Exh. 42). As Carr recalls, he first welded the sides before starting on the roof (3:339–340; 4:558, 563, 588). Carr's labor card (G.C. Exh. 42) for October 3 reflects that he worked from 1600 hours (4 p.m.) to 1918 (7:11 p.m.) doing labor code 011 and charged to 4-H [Hi-Bay]. Farr's labor code list (G.C. Exh. 59) shows 011 to be ''Shortarc Weld,'' and 070 to be ''Rework Labor.''

Bowman indirectly denies Carr's assertion of a conversation at the beginning of the shift. According to Bowman, he was busy until nearly 7 p.m. with a problem concerning the respirator in the paint department (10:1993). On returning to the welding area, he observed Bruce Carr arc gouging. As Richard Witt, the welder lead, just happened to be walking by, Bowman asked Witt what Carr was gouging. Witt informed Bowman that Carr was gouging the seams because they were closed like all the rest (10:1993–1994). ''All the rest'' presumably refers to the seams on the other nine S & S transition units.

Bowman testified that, after Witt told him what Carr was gouging, Bowman went over to where Carr was working. The primary purpose of his going over to Carr, Bowman testified, was to see that Carr was charging his gouging time to the other (fabrication) department. At that time S & S unit 8 was on its side so that Carr could gouge the roof section while standing on the floor. A crane was available to turn the unit. Bowman asserts that on that occasion he and Carr had no discussion about gouging rods. (10:1995–1996; 11:2091–2092.)

Witt testified that around 7 p.m. Carr was having trouble with his 1/8-inch arc gouging rods breaking during the gouging process. Witt showed Carr how to adjust the air pressure valve to prevent the problem. (7:1211, 1223–1224.) Carr recalls no problem with the gouging rods breaking, nor does he recall whether Witt demonstrated the proper technique for regulating the air pressure to prevent the problem (4:565–567; 12:2546). Whatever denial may be implied, Carr's lukewarm inability to recall such an event is not persuasive—especially when he is able to recall other details of October 3.

As I have mentioned, after Carr got his instructions from Bowman early in the shift to go ahead and gouge and charge to Fabrication, Carr first welded the sides of Unit 8. At approximately 7:11 p.m., his labor card (G.C. Exh. 42) reflects, Carr began ''rework labor,'' which is to say, the arc gouging. Carr testified that (to begin the arc gouging) he could not find any 1/8-inch arc gouging rods. Instead, he could find only a larger size, which was either a 5/16 or 1/4 inch. Witt was busy on a Tenkay filter house and told him to check with Bowman. Carr found Bowman and they both looked without success for smaller rods. Bowman told Carr to ''use what you have.'' (3:340; 4:585–589.) Bowman denies this, saying both 1/8-inch and 1/4-inch rods were available (10:1996).

Pickney identified records a supervisor (unnamed) had showing an order of 1/4-inch rods on August 12, 1988 (R. Exh. 6) and orders of 1/8-inch rods on May 25 and August 12, 1988. (8:1356–1360; 9:1632–1633.) I attach little weight to the requisition copies the unnamed supervisor had in his possession. Moreover, the record does not show how fast gouging rods were being used at the time or when the next requisition was. Farr apparently does not use 5/16-inch gouging rods (8:1360; 10:1997). Witt testified that Farr had 1/8-inch rods available and that they were what Carr used the evening of October 3 (7:1224). Carr is positive he did not use 1/8-inch gouging rods on October 3 (4:586). Crediting Carr that he used 1/4-inch gouging rods, I observe that the photographs in evidence (R. Exh. 90) show welding beads which appear to be more consistent with a gap of 1/4 inch (or even larger).

When he went over to Carr around 7 p.m., Bowman testified, Carr told him he was charging his gouging to welding. Bowman told him to clock off from welding and onto Department 1-S. Bowman said, ''They're responsible for us having to rework it. They can eat the labor.'' Replying with accompanying obscenities, Carr expressed his opinion that he did not think it was his responsibility to do the rework, that Fabrication should. Nevertheless, Bowman responded, Moring had decided Welding would do the rework and that ''we're going to have to rework them.'' Carr did not say he was having any problems (10:1997–1998). When he testified during the rebuttal stage, Carr did not address Bowman's assertion that the evening of October 3 Carr, with obscenities, expressed his displeasure at having to correct Fabrication's mistakes.

When Carr finished the gouging, he had the crane lift unit 8 and set it on the larger end. The ''roof'' section was then in the air (with the unit looking like a pyramid having a platform top). Carr then climbed on top and began welding. He first welded the three 1/4-inch seams he had created by gouging with the 1/4-inch gouging rods, and last of all the

[39] Carr describes the time system, with the hour divided into 100 units, as that of the military (3:338). Carr is correct only as to the hours. The 100 units derives from industry. Under the 100 unit system, 1 unit equals .6 of 1 minute. Thus, 25 x .6 equals 15 minutes, 50 x .6 equals 30 minutes, 75 x .6 equals 45 minutes, and 100 x .6 equals 60 minutes. Stated differently, the system divides an hour into tenths with 1/10 (10 units) being 6 minutes.

oversize seam which took him to the end of the shift. (3:342; 4:563, 589, 560–561, 689–690.) Carr used welding wire of .045-inch thickness, or a diameter of less than 1/16 (4/64) inch. (4:523–524, 588–589.) Conversion tables of decimal equivalents of fractional parts of an inch show that .045 is slightly less than 3/64 inch. Audel at 911; Koellhoffer at 467; Sacks at 117.

Carr's labor card shows he welded from 8:45 p.m. (2075 hours) to 10:21 p.m. (2235 hours). It then shows the code for ''General Labor'' to 11:36 p.m. (2360 hours) and, finally, welding from then until shift's end at 2 a.m. The general labor from 10:21 to 11:36 p.m. is not specifically explained. However, Bowman testified that in the timeframe of 10 to 11 p.m. to 11:30 p.m. Carr came and told him he needed the crane to ''flip'' the unit. The crane temporarily was out of service at the time and Bowman told Carr to sweep and clean his area while he waited. (10:2007–2008, 11:2093.) If that is the explanation, it means Carr had only 2.5 hours to weld the four radial seams on the roof section.

Carr testified extensively to problems he had welding that evening. The problems, he testified, were mainly on the roof section (4:558; 12:2580). He noticed the first welding defect, porosity, when he was about midway through welding the roof section. (4:559, 699.) Using the times on Carr's labor card as a reference, Carr's testimony therefore places the time of his noticing the porosity at roughly 12:30 a.m. Carr attributes the porosity to a problem with the shielding gas. He tried to correct the problem by the standard method of ''bleeding'' the lines, and he welded the last two seams after the ''bleeding'' process (3:347; 4:542, 555, 559–560, 564). As an additional corective measure, Carr shortened his usual 2- to 3-foot weld segments (4:531–532, 700–701) down to one half that in order to check for porosity, and he still found occasional porosity (4:701–702) but apparently overlooked some. As Carr explained, after watching the welding flame (through the hood visor), pushing back the hood and looking for pinhole porosity is not always a successful effort because vision is somewhat impaired from having to see the welding flash (12:2594–2595) and then, after lifting the hood, the shop lights reflecting on the metal (4:551–552).

There is no evidence that anyone else experienced problems with the gas (which comes from a common source) that evening. Witt welded seams up to 8 feet in length that evening, and he recalls no gas problems. According to Witt, he received no complaint from Carr of problems with the gas (7:1224–1225). Carr testified that he pushed hard toward the end of the shift in order to finish because he was running out of time and Bowman had said the Company wanted to send the unit to sandblasting (3:344).

Carr vaguely recalls that at one point, he thinks it was around 10:30 p.m. or so when he was on the shop floor for some reason, Bowman came over, climbed the ladder and from a position on the ladder looked at the roof. Carr concedes that Bowman could see wery little from that angle. More important, Carr is confident this occurred before he had welded the last radial seam, the one with the wide gap. (4:599–602, 686–690.) Bowman denies that such an event happened (10:2005). If Bowman did so, he apparently did so before Carr experienced any of the welding defects or gas problems (with line bleeding) because Carr does not claim that he sought, on this occasion, to discuss them with Bowman.

Witt testified that near the end of the shift Carr came to the filter house where Witt was working. Carr asked Witt to come look at his work because some of the welds did not look good and he wanted Witt's opinion whether they would pass inspection or whether they would have to be reworked. Witt told Carr he was tied up and that Carr would have to get Bowman to look at the welds (7:1211–1212, 1226–1227). Carr recalls he told Witt about the end of the shift that the welding would need some rework. He does not think Witt commented, but Carr is not sure (4:594–596).

As the welders handed their labor cards to Bowman at the end of the shift, Carr testified, Carr told Bowman that although the basic welding on unit 8 was done, some spots on the roof section would need reworking to get it to pass. ''Well, we'll worry about that tomorrow,'' Bowman said. (3:344; 4:597, 603; 12:2546, 2571–2572.)

Denying this, Bowman asserts shortly before the end of the shift he walked over to Carr's unit. Passing Carr at the time clock, where Carr and the others were standing to punch out on their labor cards, Bowman asked Carr whether he had finished. ''It's finished, ready to go,'' Carr answered. Bowman began inspecting the inside of the unit. After about 6 minutes, the buzzer sounded the end of the shift. Having inspected only part of the inside of the unit, and finding no problems, Bowman went to his desk and completed his usual 35–40 minutes of paperwork. (10:2005–2009; 11:2092–2093, 2165–2170, 2184, 2187.) Although a full inspection would have taken 35–40 minutes, and normally he does so, this time he did not because it came at the end of the shift. (10:2010; 11:2188–2189.) Moreover, a full inspection would have required climbing up on top of the unit, and no one had suggested there was a problem with the roof (10:2006, 2009).

On cross-examination Carr concedes he did not tell Bowman how much rework was needed, whether 1 hour or 8 hours (4:598), and that as another warning for him would be bad, it perhaps was a mistake that he did not take Bowman to the unit and point out the problems (4:615). Nevertheless, during rebuttal cross-examination Carr testified that he believed he had adequately informed Bowman of the problem and that it was Bowman's responsibility, once Carr reported the existence of problem welds, to say ''Hey, let's go look.'' (12:2572–2573.) Carr denies that he told Bowman the unit was finished and ready to go (12:2546). Carr asserts that the normal procedure followed, after reporting welding problems to the supervisor, was for someone to rework the unit the next day or evening (3:354). Carr did not say anything to Bowman the next evening about problems on the unit even though, according to Carr, unit 8 was still sitting where he had left it the night before. Bowman assigned him to work on something else (3:351; 4:603–604).

The better evidence is that unit 8 was set outside the following day to be sent to sandblasting, thence to painting for a coat of primer, and finally back to Hi-Bay for a final inspection on Monday, October 10. (2:157–159; 8:1423–1424, Pickney.) Although the unit normally would have been inspected before leaving Hi-Bay, Bowman testified (10:2010), the final inspection is performed after units return from sandblasting and having a coat of primer applied (10:2010, 2190). Even so, Bowman concedes that the unit should have received an initial inspection before it left Hi-Bay, but that the day shift apparently sent it to sandblasting even though he had left a note for Supervisor Danny Tinch that he had not

completed the inspection. Despite the missed inspection, no supervisor and no inspector was disciplined (11:2190–2194). Disagreeing with Bowman about the need to inspect before the unit left, QC inspector Carlos Diggs asserts that, in any event, the unit was not in the building when he came to work on October 4 and he assumed it had gone to sandblasting (11:2253–2256).

Although one benefit from the sandblasting and primer is that welding defects can be seen easier (2:158; 7:1215; 8:1424), a drawback, as Witt states, is that welding repairs are easier to make before the primer is applied (7:1215). Carr explains why—the primer has to be removed from the area to be reworked (or the primer would contaminate the new weld) (3:353). For that reason, Carr asserts, when the Company knows there is substantial rework to be done, a unit is reworked before it is sent to be sandblasted and primed (3:353). But that procedure is followed, Witt explains, only if there is no rush. If Farr is in a hurry on the unit, or the unit is behind schedule, then the rework is done after the sandblasting and priming (7:1214–1215).

Unit 8 returned to Hi-Bay on Monday, October 10. Although the evidence does not show who first discovered the defects, Day Supervisor Tinch apparently was one of the first to see them. QC inspector Carlos Diggs testified that Tinch called him over that morning to look at the welds. On the roof section Diggs saw some of ''the worst looking welds I'd ever seen.'' (11:2247–2250.) When Bowman came in at mid-afternoon, Tinch gave him the news about Carr's unit. Tinch did not testify about this aspect of the case.

Bowman testified that on October 10 unit 8 was positioned so that the roof section was vertical with Bowman facing it. Bowman found, in his words, ''a tremendous amount of'' porosity and undercutting, ''just a poor job of welding.'' (10:2012–2013.) At first Bowman did not believe Carr had done the welding, but a check of his records and the welding stamp disclosed that indeed it was Carr's work.[40] With soapstone Bowman marked the defects that had to be repaired. Considering that such work definitely would need a ''write-up,'' he went to Pickney to come look at the unit. Pickney referred him to Marvin Gardner, the plant superintendent, as the person most qualified to evaluate the welding. Bowman took Gardner to the unit, and Gardner said the welder should be written up. Reporting back to Pickney, Bowman, who knew Carr would be subject to termination for another warning, suggested that photographs be taken because Carr probably wold complain to Vic Pufahl, the plant manager. Pickney endorsed the idea of photographs. (10:2014–2018; 11:2195–2196.) Gardner and Pickney confirm these matters. Bowman made a series of photographs (R. Exh. 90) of the marked welds (10:2018–2019).

When Carr reported for work on October 10 Bowman took him to the unit. Carr confirmed it was his work. Bowman said it was unacceptable and would have to be ground out and rewelded. Carr said that if Bowman was going to complain about this then Carr was going to be (expletives deleted) angry unless he also tagged Ricky Tinch's unit. They then went to Ricky Tinch's unit. Inspecting it, Bowman found nothing wrong and Carr could not either (10:2029). ''A'' class welder Ricky Tinch is a brother of Hi-Bay's day supervisor, Danny Tinch. (10:2029–2039; 11:2110.)

Describing unit 8 as marked up like a ''Christmas tree,'' and observing that some of the spots marked were the type going out every day, Carr agrees that he confronted Bowman about Ricky Tinch's unit. However, Carr fails to describe what happened when he and Bowman went to Tinch's unit (12:2547, 2582). Moreover, Carr concedes that his principal differences with Bowman were over marks on the sides and corners rather than the roof (12:2583–2584). Although there is some question whether the photographs in evidence are all limited to the roof, it is clear that Respondent Farr's focus in this case is on the roof section.

Carr reworked the unit the evening of October 10, taking about 5.4 hours to complete the task. (3:352; 4:608–609; 10:2016, 2031; 11:2069; R. Exh. 88-3.) Bowman passed the rework and unit 8 left (2:160; 3:353). Respecting the two long crisscrossing welding seams on the roof, Carr concedes that there were areas which needed to be gouged out and rewelded, but he attributes the defects to causes beyond his control (gas, gap, and gouge). (4:552; 613–614; 12:2585.) Carr estimates the crisscrossing welds (which joined the four panels to form the roof) at no more than a total of 28 feet (12:2583). The 28 feet comes from his earlier estimate of 12–14 foot dimensions. Inches are referred to in the record, and 12–14 feet would be 248 to 336 inches.

At the end of the October 10 shift, Bowman prepared a one-page report (R. Exh. 33) to Pickney, Moring, and Gardner[41] on the welding, concluding with the recommendation that Carr be given a written warning. (10:2016, 2034–2035; 11:2196.)[42] Bowman then measured the rework, finding that Carr did 284 inches of rewelding, and he prepared a second memo (R. Exh. 32) about the 284 inches, and the over 5 hours of reworking. (10:2015–2016, 2033–2034; 11:2196.) Bowman never quite concedes that he may have measured some good weld that Carr removed in the process of blending the weld into one long weld of neat appearance (11:2205–2207).

Asserting that 284 inches would include most, perhaps all, of the weld seams on the roof (12:2583), Carr testified that in fact he did grind out some good welding in order to have the reweld match the connecting areas so as to achieve a long, continuous weld rather than having mismatched spot rewelds (12:2547-2548). Carr estimates that he reworked

[40] As a welder helper, Bobby Kirby cleaned welds of the various Hi-Bay welders. In Kirby's opinion Carr's welds looked better than those of the other welders. On one occasion in the summer of 1988 Kirby, speaking to Bowman, complimented Carr's welding. Bowman replied that Carr is ''one of the best welders'' Bowman had ever worked with (6:1073–1074). Not disputing the event, Bowman asserts he told Kirby that Carr ''could lay a better weld than anybody I've ever seen,'' and that ''I'll still stand by him on that.'' Nevertheless, Bowman continues, he did not say Carr is ''one of the best welders'' because that encompasses a lot more than simply laying a good weld (11:2097–2098). Although I credit Kirby, I find that Bowman's remark went to the quality of Carr's welds rather than to some overall evaluation of Carr as a welder. Kirby addressed welds, and that is what Bowman responded to.

[41] Although Moring was the Hi-Bay manager, he was in the process of leaving for India to visit a Farr customer there, and Gardner substituted for Moring. (8:1421; 9:1705, 1733; 12:2294, 2320.) Consequently, Bowman put both their names on the memo (10:2035).

[42] Before making his recommendation, Bowman testified, he asked his welder lead, Richard Witt, whether there had been any problems (on October 3). The only problem Carr had that night, Witt advised, was that of the 1/8-inch rods breaking. Witt told Bowman he had showed Carr how to eliminate the problem by adjusting the air pressure (8:2037). Witt was not asked about this during his testimony. Bowman does not clarify at what point in the October 10 shift he asked Witt.

about 40 percent of the roof seams (4:609). More important, Carr's own estimates of the inches of defects of porosity, undercuts, and humps, each independent of the other two are (12:2589-2591):

porosity:	30 to 40 inches
humps:	10 to 20 inches
undercuts:	10 to 15 inches
total:	50 to 75 inches

Asked why, after discovering his porosity problem, he continued to weld rather than stopping and reworking the bad spots (12:2592), Carr had difficulty articulating his explanation. Undercuts and porosity are not easy to see, he testified. (12:2594–2596.) Earlier, as noted, he testified that he had welded two of the four seams (counting the two crisscross seams as four radial seems) before he discovered a porosity problem, after which he bled the gas line and shortened his segment welds in order to check on his work. Even so, many of the problem spots were in the oversize gap seam, which he welded last. Recall also that Bowman had told Carr he wanted to finish the unit that night, and that Carr pushed hard to accommodate the Company's desire. Carr testified that he did everything he could trying to correct the (gas) problem (12:2540, 2591), and that under normal procedure, as earlier summarized, the goal is to complete the welds and do the rework later.

In short, Carr's position is that he acted in a good faith attempt to accomplish the mission Supervisor Bowman had assigned him. Pickney testified that he believes Carr's bad work either bordered on being intentional, (2:146), or was intentional, because he does not think a welder of Carr's ability would do that amount of poor work and not be aware of it (3:192). Pickney concedes that the final warning (G.C. Exh. 11) issued to Carr over this matter does not express an opinion that the work was intentional (9:1657). The General Counsel argues that this new position is inconsistent with the original and warrants an adverse inference (Br. 68). On both occasions Pickney simply expressed his opinion in answer to questions about Carr's work. Having that opinion is not the same as being in a position to state such a conclusion on the warning/discharge notice. In any event, as Pickney never saw the welding (8:1425), his opinion is based on the reports of others.

Richard Witt, then the second-shift welder lead, testified that he saw the unit on October 10. Knowing that Carr had the ability to do much better, Witt is of the opinion that the bad welds were intentional (7:1227–1230). Witt's testimony on this point is attended by controversy. Called as a witness by the General Counsel, Witt gave the foregoing while on cross examination. On redirect examination the General Counsel established that Witt had given two pretrial affidavits. Witt admits that in neither did he report his view that Carr's work looked intentionally bad. Witt says the Board agent asked him about Carr's work generally, not the work on unit 8; therefore, it never came up that Witt thought those welds looked intentionally bad (7:123–1232). Witt confirms that his affidavit of November 2, 1988, contains the following statement (7:1233): ''I heard Bruce Carr was fired for poor work. I never saw the work he did that night.''

His understanding of those lines, Witt explains, is that he never saw the work ''on October the 3rd.'' (7:1233.) That is, it was later that he saw it (7:1233).

In his second statement, given on February 28, 1989 (7:1221, 1233), Witt reports (7:1233–1234):

> Then Moore and Davis [apparently Farr's two co-counsel] asked us what we knew about Carr and this weld. They had pictures of a weld, though I couldn't tell it was Carr's or what was wrong with it, though I could tell it wasn't a very good weld.

It seems strange that Witt, even reading the first quote as not meaning on October 3, did not tell the Board agent, ''But I did see it a week later.'' Witt's demeanor was unpersuasive on this topic. Not believing Witt, I find that, as his first affidavit states, he never—not even on October 10—saw the welding seams on unit 8. I am persuaded he changed his story, at some point after his second affidavit, to please his employer.

(4) October 11, 1988—Bruce Carr fired

When Pickney arrived at work Tuesday morning, October 11, he found on his desk the two October 10 memos (R. Exhs. 32, 33) from Bowman. Pickney asked Bowman if there was any reason Carr would have done such work, and Bowman said no. Asked if he had talked to Witt, Bowman replied yes, and that there was no reason (to excuse this). Pickney went to Marvin Gardner and informed Gardner that discipline of Carr would mean discharge and asked Gardner to review the situation carefully. (2:127; 8:1422–1423; 9:1658.) Gardner testified that he went out and spoke with Day Supervisor Tinch and day leadman Gene Haner and ascertained that they considered Carr's welding on unit 8 as ''bad.'' Gardner testified that he then went to Pickney and they ''decided to take action,'' although he cannot recall his conversation with Pickney. Gardner testified that he approved the discharge and that Carr's union activities, of which he was aware, played no part in his decision (12:2309–2312).

Pickney is a bit unclear on the sequence, but it appears Gardner first came to Pickney's office where they reviewed Carr's file. Gardner then left to interview the others. Later Gardner returned and reported that there were no extenuating circumstances to excuse Carr's bad welding and that his decision was to proceed with the termination. (2:130–131; 152–153; 8:1422, 1230–1433.) Apparently at that time Pickney went out and interviewed Tinch, Haner, and Carlos Diggs, the chief QC inspector. Each informed Pickney there was no reason for the bad welding and no justification for not stopping (8:1422–1423). At some point Pickney informed Vic Pufahl, the plant manager, of the decision to terminate Carr and reported the investigated facts. Pufahl said to proceed with the termination (2:131; 8:1425). Pickney prepared the termination paper that afternoon (8:1433).

Because Pickney had a 4 p.m. meeting away from the plant, the termination meeting did not occur until about 9 p.m. Present in the Hi-Bay office were Pickney, Bowman, and Carr. Bowman testified that he read the termination notice to Carr, that Carr *noted* his disagreement on the form, *signed* it, but did not say much. At no time, either before the meeting or during it, did Carr offer any explanation or excuse, Bowman testified. Nevertheless, Bowman concedes that some more things were said, and that he and Pickney told Carr the decision was final. (10:2036–2038.)

Pickney testified that after Bowman read the termination notice Carr asked that Richard Witt be brought into the meeting. Pickney explained that Witt already had been consulted, that Gardner had made the decision, and that at 9 p.m. there was no way Pickney could change anything no matter what Witt had to say. However, Pickney added, there was an appeal procedure available to Carr and Carr knew what to do. Carr said he would appeal and that they had not heard the last of this. The meeting lasted about 10 minutes. (2:134–135; 8:1428–1429.)

Carr recalls that Pickney did the talking, advising him that he was being given a warning for poor quality work and that the warning resulted in his termination. Carr attempted to explain the problems he had experienced, and he requested that Richard Witt be brought in. Pickney said he did not want to hear any of it, that the matter had been investigated, the decision was made, had been reviewed, was final, and that he was terminated. Pickney recalls nothing being said that they already had spoken to Witt. Carr concedes he did not say in the meeting that there was no bad welding on October 3, and he observes that no one there said his work was intentionally bad. Carr denies any intention to do bad work the evening of October 3. (3:354–355; 4:611–614.)

To the extent the accounts differ I credit Carr's version, although I find it likely either Bowman or Pickney did mention that Witt had been spoken to. Carr testified that he did not file an appeal within the Farr grievance procedure because he chose instead to go to the NLRB (4:615–616).

(5) Disparity evidence

The General Counsel argues that Respondent Farr disparately issued warnings to welders for poor quality work. (Br. 34–37, 71.) It is true that Respondent did not issue a warning every time Carr or someone complained that the welder (usually a welder not showing an open indication of his union sentiments, or one who was not in favor of the IUE) had made a welding defect. When Farr's supervisors were aware of the situation, they usually did not agree that the matter warranted a warning. Bowman, for example, testified that Carr frequently complained about ''little mistakes'' in the work of Roy Cline (11:2094). In fact, as to Roy Cline and others apparently not IUE supporters, Farr has issued written warnings to them for poor quality work. Thus:

Tommy Kirby	3–16–88	G.C. Exh. 25(c)
Dewayne Jacks	4–12–88	G.C. Exh. 25(b)
	7–06–89	G.C. Exh. 25(f)
Stevin Tilley	9–16–88	G.C. Exh. 25(d)
Joe Carroll	9–19–99	G.C. Exh. 25(a)
Roy Cline	10–10–88	G.C. Exh. 25(g)

Pickney's warnings list (R. Exh. 2 at 6) shows that Joe Carroll also received a first written warning for poor quality on February 24. The September 19 warning was a ''final.'' Even Richard Witt received one on August 16 for a safety violation (R. Exh. 2 at 6). Although ''safety'' is not necessarily welding, it seems closely related. In any event it shows (as do Farr's warnings to and even discharge of employees in other departments) that Farr uses its written warning procedure frequently even if not every time a neighboring employee would think that a mistake should get a warning.

Ricky Tinch apparently has received no written warnings for quality. As mentioned earlier, he is the brother of Danny Tinch, Hi-Bay's day-shift supervisor (11:2110). The evidence is mixed as to Ricky Tinch, but on the most relevant comparison, Carr's complaint to Bowman on October 10 about poor quality work on, apparently, the same type of S & S transition unit Carr welded, Carr fails to tell us (he is not asked) what happened when he and Bowman together inspected Tinch's unit (12:2547).

Even if supervisors declined to issue warnings to some employees for mistakes, so, too, they did as to Carr. As summarized, in early July 1988 Hi-Bay Manager Glen Moring only orally warned (R. Exh. 23) Carr, principally as to quantity. Less than 2 months later Bowman did the same with Carr, this time as to rework caused by carelessness (picking up wrong part) and inappropriate welding technique (horizontal weld missed) (G.C. Exh. 12). Had Moring and Bowman been looking for any excuse to issue Bruce Carr a written warning, so as to hasten Carr's involuntary departure, surely they would have done so on these two occasions. In any event, it demonstrates that Carr also benefited from Farr's failure to issue a written warning on every occasion of a mistake.

That brings us to the transition units. Carr did only 1 of 10. Most, perhaps all, had the butted seam and gap seam problems experienced by Carr, yet apparently Carr is the only welder to produce poor welds (or at least a substantial amount of welding defects). If Carr had to work under any different lighting conditions, the evidence fails to disclose that fact. Although most of the other units apparently were welded on other dates or shifts, other welding was done the evening of October 3, yet Carr is the only welder who experienced problems with the gas.

Finally, there is no credible evidence that Farr has ever condoned the amount of poor welding Carr did the evening of October 3. By Carr's own estimate, 50 to 75 inches of the welding seams were defective. As Carr would have to gouge or grind out more than that to match the connecting welds, it is safe to say that even under his own estimate some 100 inches would have to be reworked. Supervisor Copeland testified that he cannot conceive of a welder requiring that much rework and not receiving a written warning (12:2461–2462). I find that the evidence does not demonstrate disparity.

(6) October 12, 1988—comments by Supervisor Larry Smith

Larry Smith is, and was in October 1988, the day-shift supervisor over the filter area and maintenance department. (10:1901.) Bobbie J. Gathright worked on Smith's filter line in October 1988. (4:705, 709; 10:1905.) Gathright testified that the day after Carr was fired employees were discussing his discharge. Shortly after work started, and while working at the filter line making labels about 5 feet from Smith's desk, Gathright asked Smith if Carr had been fired, and Smith confirmed it. She asked what for, and Smith told her to guess. ''What was it, over the union?'' she asked. Smith replied, ''Pickney said it was over the bad welds. But I've got a whole damned table full of bad welds back there. They are not Bruce's. I can take you back there and show you.

Bruce is a good welder. The guy that welded them back there is still here.'' Gathright observed, ''Yeah, I know, over the union.'' Saying something which Gathright cannot recall, about Carr's being ''canned,'' Smith laughed without disagreeing with her observation. (4:706-707, 711–714.) Gathright is unsure of what items Smith was referring to as having bad welds, and she did not ask him to show her because she was busy making labels (4:714–715). Because of an industrial injury, Gathright's last work day was October 14. Although she was fired on January 23, 1989, and thereafter became angry at Farr over the handling of her injury claim (4:715–718), her version of this conversation with Smith predates her anger as evidenced by her written statement of December 15, 1988 (4:711, 718–720).

Denying that conversation (10:1904–1905, 1907–1908), Supervisor Larry Smith asserts that the conversation he did have with Gathright about Carr's discharge occurred when she came to the plant the evening of October 21 (he was substituting for Supervisor Copeland) to get her flu shot (10:1905–1906). Gathright accused Pickney of terminating Carr ''because of his union activity.'' Smith replied that he did not know anything, and all he knew was shop floor talk. ''I'll say this much in behalf of Bruce Carr. Bruce is capable of doing a good job. He can do good work. Now, if he got sloppy and it caught up with him, that's Bruce's fault.'' (10:1906–1907.) Identifying Gathright's labor card for October 12 (R. Exh. 95), Smith points out that Gathright worked on a pleater until about 9:30 that morning when she began making labels. The pleater is 25 feet away from his desk (10:1908–1910). Gathright did not testify in rebuttal to explain the discrepancy between her testimony and her labor card.

Although I am inclined to credit the description of both conversations, October 12 and 21, I find it unnecessary to resolve the labor card discrepancy. Gathright's testimony adds no weight to the Government's case. The conversations merely show that Supervisor Smith's initial personal reaction was skeptical because he has a high opinion of Carr's welding ability. There is no evidence Smith ever inspected the roof welds on unit 8. Pickney is not quoted as giving any reason other than the bad welds for Carr's discharge. Accordingly, I attach no weight to Gathright's testimony.

(7) Analysis and conclusions

Although Respondent Farr was well aware that Bruce Carr was the IUE's leading activist, that was old news. I have found that the January 1988 appraisal of and warning to Carr reflect union animus. Other evidence shows Farr's hostility to unionism and its professed willingness to retaliate against employees who support a union organizing effort (Pufahl and Gardner to welder Ray Smith shortly before the November 20, 1987 election). Indeed, I have found Farr did just that by unlawfully failing to promote Carr to A class welder in June 1988.

In July and in August Farr passed over an opportunity in each month to issue written warnings to Carr. However, the August matter (Bowman's ''verbal'' warning of August 27) concerns something less than clearly bad work. It can be argued that Farr, as an employer sophisticated in labor relations (with the knowledgeable Personnel Manager Darrell D. Pickney being in residence), merely displayed the wisdom of patience, knowing, as do poets, that ''All things come round to him who will but wait.''[43]

Pointing to the fact that Carr was terminated less than 2 weeks after he and three other employees met with the IUE at a popular local restaurant for dinner to form plans for the second election campaign, and only 4 days after the second such meeting, the General Counsel argues that the timing factor demonstrates unlawful motivation (Br. 67). The timing factor carries little weight for two reasons. First, there is no evidence that a representative of Farr observed (or learned of) Carr and the others meeting with IUE representative Ronnie Crider. Second, Carr performed the welding at issue on October 3—a recent event. Timing would be significant if the evidence disclosed that Farr had fully inspected and passed unit 8 the morning of October 4 *before* sending it to sandblasting, and *after* the second union meeting of October 7 saw fit to reverse the passing grade for unit 8. So far as the record shows, that was not the sequence.

I credit, in part, Carr's version of his end-of-shift report to Bowman. Consistent with former welder lead Richard Witt's testimony that Carr came to him near the end of the shift and expressed concern whether some of the welding would pass inspection, I find that Carr reported to Bowman that there was a problem with some of the welding. In making this finding I do not rely on the corroborating testimony of J. D. Greer. I attach little weight to the fact Carr initially reported that Bobby Kirby rather than Greer had overheard the last part of Carr's conversation with Bowman. Although I have not summarized these additional points, I have considered them. As it was the end of the shift, Bowman's reported reply of worrying about that ''tomorrow'' is likely. Carr did not mention the roof, I find, and that is why Bowman did not make a special effort to check the roof.

The note Bowman left for day Supervisor Tinch would, I find, if produced, reveal a caution that the unit needed to be inspected because Carr had reported the welding had some problems. Whether because of a snafu, or a misunderstanding, or some other unknown, unit 8 went to sandblasting without (so far as the record shows) an inspection, I need not speculate. Little was lost by the delayed inspection, but some 40 percent (4:609) of the welding had to be reworked. I credit Carr that he was having problems with the welding gas, that he did his best to overcome various problems, and that he continued welding in order to accommodate Farr's desire to complete the welding and to leave the rework for the next day. However, these findings merely reject any contention that Carr intentionally did bad welding. From an objective standpoint, Farr possibly could conclude that there was no excuse for Carr's not stopping rather than creating the extensive amount of welding defeats. No one else had gas problems or even (so far as the record shows) other welding problems in gouging the butted seams or welding the oversize gap. These facts are not favorable to Carr. Moreover, the evidence the General Counsel offered on the point of generalized disparity adds no weight to the Government's case.

The manner of Carr's discharge raises some question, but offers little help for the General Counsel's case. Carr was not interviewed during the ''investigation'' by either Gardner or

[43] Longfellow, ''The Falcon of Ser Federigo,'' last line, in ''Tales of a Wayside Inn'' (1863), *The Poetical Works of Longfellow* 209, 213 (Cambridge ed. 1975).

Pickney. As described, Bowman did confront Carr, but that was not in a context of an investigation in which Carr wold have understood he needed to describe the problems he faced the evening of October 3. Past practice for written warnings is a unilateral decision with the employee having an opportunity to write a comment on the warning. From Farr's standpoint, Gardner—not present—earlier had made the decision and Pickney had cleared it with Pufahl. By 9 p.m. it was well past a ''done deal.'' Carr was called in not for an investigatory interview, but to be discharged. Farr's procedure allowed for an appeal at which Carr could have called in Witt and presented his story. That postdischarge option is less than attractive. However, Farr's internal procedure does not specify that the employee and his evidence and witnesses be interviewed before a decision to discipline. Even if that seems unfair and therefore unwise, a consistent adherence to it does not demonstrate animus.

Assuming that the General Counsel has established a prima facie case as to Bruce Carr, I nevertheless find that Respondent Farr carried its burden of demonstrating that even in the absence of Carr's union activities the Company would have fired Bruce Carr over his work on S & S transition unit 8. Objectively the work had a substantial amount of welding defects. Although I believe Carr made a sincere effort to do a good job the evening of October 3, 1988, and that factors beyond his control prevented this, from Farr's vantage point the objective facts were unfavorable to Bruce Carr. Carr told Witt of the gas problem and thereafter bled the line (gas hose) in an unsuccessful effort to prevent porosity. However, Carr did not report back to Witt that the proprosity was continuing, and not until the end of the shift did he ask Witt to look at the welds. Carr makes no claim that he stopped the bad welding and went to find Bowman. Perhaps Bowman and Witt should have checked on Carr's work periodically. Perhaps they would have but for other problems. The bottom line is that Carr turned out a substantial amount of defective work the evening of October 3, 1988. Farr's written warning to Carr for this work was consistent with its past practice.

No doubt Respondent Farr derived satisfaction from being able to get rid of Bruce Carr, the leading activist for the IUE. However, that incidental probability is immaterial. *A & T Mfg. Co*., 276 NLRB 1183, 1184 (1985). Accordingly, I shall dismiss complaint paragraph 12(c).

2. Bobby R. Kirby

a. *Allegations*

Complaint paragraph 12(b)(1) alleges that Farr issued a written warning to Bobby R. Kirby on August 31, 1988. In its answer (R. Exh. 9), Respondent Farr admits that fact.

Complaint paragraph 12(b)(2) alleges that Farr refused to promote Kirby to the position of painter on September 1, 1988. Farr also admits that fact.

Complaint paragraph 12(b)(1) also alleges that ''as a result of'' the August 31, 1988 warning, Farr suspended Kirby on July 24, 1989, and terminated him on July 28, 1989. Admitting the facts and dates of Kirby's suspension and discharge, Farr asserts, in paragraph 4 of its answer, that such events resulted from the Company's ''progressive disciplinary procedures.''

In conclusionary paragraph 17, the complaint alleges that by the foregoing acts Respondent Farr violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. § 158(a)(3) and (1). Farr denies that allegation.

b. *Introduction*

Farr issued a first written warning (G.C. Exh. 8) to Bobby Kirby on August 31, 1988, for displaying an insubordinate attitude on August 30. That warning is the subject of complaint paragraph 12(b)(1). Farr issued a ''final'' (second) written warning (R. Exh. 55) to Kirby on September 7 for poor quality work while cleaning and caulking a high efficiency filter house. The Government does not attack the second, or ''final,'' written warning. Kirby sustained strike three (G.C. Exh. 27) on July 28, 1989, again for poor quality of work.

Having received three written warnings within a 12-month period, Kirby was fired. Although the Government does not attack the third warning, and does not allege Kirby's discharge to be unlawful, it does seek Kirby's reinstatement (Br. 62, notice) and backpay from the date of his discharge (notice attached to brief). (The promotion allegation is a separate matter.) Thus, rather than alleging Kirby's discharge to be unlawful because grounded on an allegedly illegal first written warning with the remedy being the standard reinstatement and backpay, the General Counsel seeks the same remedial result without a finding that the discharge is unlawful.

But, Respondent Farr counters, even if the August 31 warning is declared invalid Farr still would have fired Kirby because of ''verbal'' warnings Kirby received in the interim (Br. 203–205). That is, to discharge its burden under Wright Line,[44] Respondent's counsel argued at the hearing that if Farr had known the first written warning would have to be withdrawn, then instead of issuing one of the orals as a documented verbal warning, Farr would have issued a written warning.[45] (3:215; 7:1176; 8:1457, 1469–1471, 1476, 1482–1485.) Personnel Manager Pickney (8:1479–1482) and Keith Bowman (10:2050–2051), Kirby's supervisor during most of the relevant time, so testified over the General Counsel's vigorous objection that such evidence (exhibits and testimony) is irrelevant as based on speculation and a misreading of *Wright Line*. (7:1175–1177; 8:1458, 1475, 1480, 1483–1484; 10:2051.) Pickney seems to suggest that such an event (voiding a written warning months later and then elevating an intervening verbal into a written replacement) has never occurred (8:1481–1482).

Farr cites and relies on *NLRB v. A & T Mfg. Co*., 738 F.2d 148 (6th Cir. 1984), where the court remanded because the Board had considered A & T's motive only at the time of the decision to discharge rather than at the time of discharge. An intervening event, testimony reflected, also was an independent basis for the decision. On remand, the Board dismissed the complaint, finding that A & T had met its *Wright Line* burden. *A & T Mfg. Co*., 276 NLRB 1183 (1985). *A & T* stands for the proposition that in dual motivation cases

[44] *Wright Line*, 251 NLRB 1083, 1089 (1980), approved at *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983). Recent civil rights decisions by the Supreme Court have not modified the Court's approval of *Wright Line. Sonicraft v. NLRB*, 905 F.2d 146, 149–150 (7th Cir. 1990).

[45] Apparently as a kind of constructive issuance, or as an ''after-the-complaint look-back'' motivation.

the focal point of evaluation of the employer's motive is at the time the discharge takes place.

Earlier, when discussing the 8(a)(1) allegations pertaining to Personnel Manager Pickney, I briefly described Bobby Kirby's employment history at Farr before I summarized the rumor meeting on August 30 in Pickney's office. A few supplementary details will be helpful.

First, the job description (G.C. Exh. 9; 1:79) for a spray painter at Farr specifies, among other qualifications, experience of 1.5 years. The job vacancy notice (R. Exh. 47) which Pickney posted on Thursday, August 25, specified (in addition to ability to mix paints for correct consistency and color and ability to spray paint) 1.5 years of spray painting experience. Second, when he submitted his bid (R. Exh. 48) on Friday, August 26, Kirby admittedly knew he needed some experience. He also had seen the requirements posted on the bulletin board, although he professes, in view of the time lapse, not to know exactly how many years' experience was required (6:1101).

Third, in his August 26 bid for the painting job Kirby, in answering the question about his qualifications, wrote that he had painted ''about 1 year'' at a previous employer (Turner's Cushion) and that he had ''helped'' Farr's Paul Ishmael (6:1098). At the hearing Kirby admitted that the ''about 1 year'' at Turner's was really some 2 months. (6:1085, 1096–1097, 1100.) Kirby's experience assisting Ishmael turns out to have been for about 2 to 3 weeks (6:1085). Conceding the obvious, Kirby now agrees that at the time of his August 26 bid he did not have the required 1.5 years of spray painting experience (6:1102). This discrepancy is relevant only as to credibility, for Pickney testified that had Kirby passed the painting test Farr would not have looked outside the company for a painter (9:1659–1660). (What Farr would have done had it known of the discrepancy is not addressed.) On August 26 Kirby was earning about $6.40 an hour. The painter position carried a range of $6.54 to $7.20 and, as he testified, Kirby would have earned more as a painter. (6:1086; R. Exh. 47.)

By his September 1 memo to Kirby, referencing his job bid, Pickney thanked Kirby for his interest in the painting vacancy in 2-P. Pickney's memo continues (G.C. Exh. 50; 6:1083–1084; 8:1447):

> After careful review of your past painting experience and the results of the paint test that was administered to you on 8/29/88, I regret to inform you that you can not be selected to fill this position. This decision is based on our determination that you are not qualified to perform the job at this time.
>
> I encourage you to solicit any on [of] the training that might be available in the painting area to better prepare you for when another vacancy occurs. I also encourage you to continue to bid on any job posted that you are interested in and qualified to perform.
>
> Thank you,
> /s/ Darrell
> Darrell

Pickney delivered the memo in person to Kirby at the Hi-Bay office and told Kirby that Richard Barton, a painter with 6 years' experience, had been hired for the job. (6:1084, 1117–1118, 1126–1127; 8:1447.)

c. *The August 29, 1988 painting test*

On Monday, August 29 Comer Reynolds administered spray painting tests separately to Bobby Kirby and then to Kenneth Heindselman. Heindselman did not testify. Kirby recalls that he was given only one part to paint in the 10–15 minute test, and he stresses that it was a Dyna cell holder, perhaps the most difficult part to paint that Farr has. Kirby describes his test painting as good, with no runs, no missed paint, and no bare metal spots. (6:1076, 1128; 7:1157–1159, 1193.)

According to Reynolds, he tested Kirby on ''probably half a dozen parts'' taken off the floor and hung on a conveyor line. The parts were Dynavane cell parts, blade pack parts, and a plenum pan. The parts are simple to paint, Reynolds testified, but Kirby painted poorly. Kirby missed spots, left some light and heavy paint areas, with some runs. Kirby's technique was inexperienced because he failed to release the trigger at the end of each pass. Reynolds testified that the painting of neither Kirby nor Heindselman was acceptable, nor were the answers of either to questions about paints. Reynolds agrees that the test lasted 10–15 minutes. (12:2359–2364, 2392–2393.) As a witness in the rebuttal stage, Kirby was not asked about his painting technique or whether Reynolds asked questions about paints.

In his direct examination Pickney describes Kirby's painting test as consisting of putting ''parts'' on the line and painting them. (8:1444–1445.) Pickney makes no contention that he was present at the testing, and he concedes that he did not inspect the test painting (8:1446). In a September 28, 1989 pretrial affidavit, Pickney describes the test as ''consisting of painting a unit or a part with a spray gun.'' (R. Exh. 26 at 4; 9:1663.) Pickney explains that he simply was describing the procedure, not the number of parts (9:1664). Pickney (8:1445–1446) and Reynolds (12:2365) testified that Reynolds discussed the failure with Pickney the next day, August 30. Presumably Reynolds conferred with Pickney well before Bowman, at Moring's call at the beginning of the 4 p.m. shift (10:1966), sent Kirby to Pickney's office where the rumor meeting was held.

Pickney testified that he secured an experienced painter, Richard Barton, from a temporary service (1:81; 8:1446). When he came for an interview, Barton also filled out an application for regular employment, dated August 31 (R. Exh. 64), reported the next day (September 1) for temporary duty, and was hired as a regular employee on November 7. (R. Exh. 65; 8:1487–1489; 12:2366.)

According to Reynolds, union considerations played no part in his rejecting the painting tests of Kirby and Heindselman. (12:2365–2366.) Reynolds even claims he was unaware of Kirby's union sentiments. Pointing out that Kirby did not work for him, Reynolds is unable to say whether Kirby was wearing a cap or an IUE sticker on the cap when he took the test, although Reynolds admits that Kirby could have been (12:2393).

When the second election campaign began, Kirby, on September 15, signed an IUE authorization card (G.C. Exh. 49; 6:1087). Before that, about a month after he went to Hi-Bay in March, he testified, Kirby began wearing an IUE sticker after Bruce Carr talked to him about the IUE (6:1072). Kirby's recall of which month he transferred to Hi-Bay was uncertain. Thus, his April estimate as the time he began wearing an IUE sticker must be understood as a rough esti-

mate. For a more definite time frame we may refer to Carr's testimony that he, Carr, resumed wearing his IUE sticker about May 11 or 12. Presumably any persuasion by Carr of Kirby occurred no sooner than May 11. May, however, is consistent with Kirby's testimony.

Elsewhere I have found Reynolds unworthy of belief. I do not believe him here, either. Granted, Kirby's credibility gives me pause. I consider as a negative factor Kirby's job-bid embellishment of his painting experience. Nevertheless, overall I find Kirby the more credible witness. I accept his version, and I find that he did pass the painting test.

d. *August 31, 1988 first written warning*

Recall that at the end of the August 30 rumor meeting (on which I postponed my conclusions) Bobby Kirby returned to Hi-Bay. Most of what happened when Kirby returned is undisputed, and most of what is disputed is not particularly significant. To the extent the matters are disputed, I generally credit Supervisor Keith Bowman and Hi-Bay's manager, Glen Moring, over Kirby.

Supervisor Bowman testified that Kirby returned to Hi-Bay in an angry mood. Walking fast with fists clenched, and kicking a 5-gallon bucket, Kirby—talking to Bowman—yelled (10:1967–1968, 2141–2142):

> I don't do anything wrong and I'm the one that gets in trouble for it. I don't even do anything and I'm the one that's going to get fired over it. You tell them if they want to fire me to come out here and do it.

Bowman paged Moring. Still in Pickney's office (8:1453–1454; 9:1669, 1770–1771), Moring called Bowman who reported Kirby's conduct and remarks. I do not credit Kirby's denials that he kicked the can. (6:1081, 1108; 7:1162.) Moring does not mention the can-kicking (or the cussing) in his short hand-printed memo of August 30 (R. Exh. 50) to Pickney on the Hi-Bay events. (9:1774–1775, 1814–1817.) Despite Moring's initial response (later modified) on cross examination that he intended the memo to be a full report (9:1814), the description about Bowman's report on Kirby's conduct consists of but a single sentence focusing on the ''man enough . . . come out and do it'' remark. The bucket kicking was a mere incidental to the challenge in the words. Indeed, Pickney testified that had simply kicked the can, without saying his words, no discipline would have ensued (9:1669–1670).[46]

Actually, Bowman seems to have told Moring that Kirby said if Moring was man enough (9:1771; 10:1968), and Kirby so recalls it (6:1081, 1108). According to Moring, Bowman also reported that Kirby was ''cussing.'' (9:1771, 1814.) Both Kirby (12:2520) and Bowman (11:2142) deny that Kirby did any ''cussing.'' In any event, Moring went to Hi-Bay and a meeting ensued with Moring, Bowman, and Kirby. Asked by Moring what he had said, Kirby at first gave a toned-down version. When Bowman told Kirby to tell the truth,[47] Kirby repeated what he had said, explaining that he had been angry and that he was sorry. Moring told Kirby that his remarks were a challenge to his authority which he could not tolerate and that he would give Kirby a written warning, and that if Kirby did not change his attitude he would end up losing his job. (9:1773–1776, 1817; 10:1970; 11:2149.)

At a meeting in Moring's Hi-Bay office the following day, August 31, in the presence of Bowman, Moring gave Kirby a first written warning (G.C. Exh. 8) for ''Attitude—Insubordinate'' concerning the previous day. (6:1082, 1112; 7:1160; 9:1777; 10:1959, 1971.) Although Pickney was not present (6:1083, 1111–1112; 8:1454), Moring had consulted with him and testified that Pickney concurred (9:1777). Pickney testified that the Company Statement portion of the document sets forth all the reasons for the warning (1:78; 9:1668). The ''Company Statement'' portion reads (7:1160):[48]

> A meeting was held [August 30] between Bobby Kirby, Glen Moring, and Darrell Pickney, where Bobby was told that he was exhibiting a very poor attitude and it must improve in order to continue his employment at Farr Company. At the end of the meeting, he went to his supervisor [Bowman, in Hi-Bay] and told him, ''If they are man enough to fire me, they can come out here and do it!* When asked, he confirmed to Glen Moring that he made this statement.
>
> *Fire me themself.

At Kirby's request, Moring made the correction shown at the asterisk. (7:1160–1161, Kirby; 9:1777, Moring.)

In the ''Employee Statement'' section, Kirby checked the box saying that he concurred with the Company's statement, and he wrote that Ray Copeland also was in the meeting (the rumor meeting in Pickney's office on August 30). (6:1112–1113; 7:1160–1161.) Kirby admits that neither Farr's statement nor Kirby's includes any reference to Kirby's wearing an IUE sticker on his hat (7:1161–1162). The ''Warning Decision'' states:

> This is a 1st written warning for a poor, insubordinate attitude. Any other performance or policy violation within a twelve month period will be reason for a final written warning. Written warnings are designed to make employees aware of actions needing correction and to allow an opportunity to display future improvement.

Moring, Kirby, and Bowman signed on August 31, and Pickney's signature also bears the same date (G.C. Exh. 8). Kirby testified that Moring told him he would not tolerate such behavior (6:1083).

As mentioned earlier, the next day, September 1, Pickney delivered to Kirby the letter (G.C. Exh. 50) rejecting his bid for the painter's position. The record is sparse and unclear on the sequence. Kirby testified, on cross examination, that on September 1, in Moring's office with Bowman possibly present (but Moring apparently not), Pickney gave Kirby the rejection memo. (6:1121, 1126–1127, 1135.) At the same time, Pickney explained that Richard Barton, a painter of 6 years' experience, had been hired. Kirby professed his belief

[46] Presumably Pickney means that if no willful damage resulted from the can-kicking. On June 6, 1989, Farr issued a first written warning (G.C. Exh. 28b) to James Chapman who, in his frustration on May 30, took a hammer and beat, damaged, and destroyed company property.

[47] I do not credit Kirby's denial that he initially gave a softer version or his denial that Bowman then told him to tell Moring the truth (12:2521).

[48] As G.C. Exh. 8 is a poor copy, the quotation is from R. Exh. 51, a duplicate exhibit. (7:1159–1160, 1166–1167.)

that the reason he did not get the job was his IUE sticker (6:1121). No, that had nothing to do with it, Pickney replied (6:1123). Pickney then explained (somewhat inconsistent with the rejection memo), ''the reason you didn't get this job is because we found a painter that had six years experience.'' (6:1126–1127.) There is no testimony by Kirby that he then reminded Pickney that barely 2 days earlier, in the rumor meeting, Pickney had equated Kirby's IUE sticker with a bad attitude and said that he takes attitude into consideration on promotions.

Kirby concedes that after the meeting, still believing his IUE sticker was the reason for his rejection, Kirby expressed his belief to others around the plant. ''I didn't get a fair chance at the job,'' Kirby testified. (6:1119–1120.) What is not clear is whether Pickney called Kirby in again and reiterated that Kirby's IUE sticker had nothing to do with his unsuccessful bid. A brief answer by Kirby suggests that the additional meeting occurred (6:1120). Moreover, apparently at the September 1 meeting, or at one if there were two, Pickney also informed Kirby that the person selected for the maintenance position Kirby had bid on earlier had more seniority and maintenance experience than Kirby (6:1106).

e. *Subsequent warnings and July 28, 1989 discharge*

Whether the result of a negative attitude by Kirby, discrimination by Farr (there are no complaint allegations), or from some other cause, Kirby soon began having work performance problems, or at least receiving warnings for such. This situation carried into January 1989. Later in January 1989, and doubtlessly related to the discontinuation of the second shift, Farr experienced a layoff. As mentioned earlier, Kirby was transferred from Bowman to the filter line under Larry Smith, the day supervisor there. Bowman testified that he was not thereafter involved in the events of Kirby's discharge (10:2053).

Bowman gave his first ''verbal'' warning to Kirby at the beginning of the shift on September 7 concerning poor quality work in cleaning an S & S module. Bowman told Kirby his quality and speed would have to improve. The next day Bowman wrote a half-page memo (R. Exh. 53) to Moring and Pickney covering the matter (10:1973–1977). The memo was placed in Kirby's personnel file (9:1783).

Later in the September 7 shift Bowman assigned Kirby the task of cleaning a filter house. That work, too, was poor. Bowman spoke to Moring and on September 12 a second (''final'') written warning (R. Exh. 55) was issued to Kirby. (7:1171–1173; 9:1784; 10:1975–1980.)

On September 10 Bowman cautioned Kirby against speeding on the employee parking lot and submitted a half-page memo (R. Exh. 54) to Moring/Pickney covering the matter (10:1977–1978). The incident is not expressly described as a verbal warning, although Bowman considers it one and has written similar reports on others (11:2152–2153).

A dispute exists concerning whether Kirby, pushing a cart on a track on September 14, cut a $120 paint gun hose after Bowman had told Kirby first to move all the hoses from the track. (10:1987, Bowman.) Bowman wrote up the matter (R. Exh. 78) and submitted it to Moring, concluding with the question, ''What do you think?'' Moring's response, written the next day on the reverse side, is: ''Accidents do happen. Give Bobby verbal and caution him to pay more attention to instructions.'' Bowman testified that he wanted to give Kirby a written warning over the matter so he would be terminated, but that he was overruled. He does not recall telling Kirby (earlier) what action would be taken, and after receiving Moring's note and conferring with Moring, Bowman did not discuss the matter further with Kirby. (10:1988–1990, 2051: 11:2161–2162.) Kirby denies such an event, denies running over and cutting a paint hose, and denies that Bowman ever said anything to him about such an event. (7:1178; 12:2519.)

As earlier mentioned, Kirby signed his IUE authorization card (G.C. Exh. 49) on September 15 (6:1087). Not long after Carr's mid-October discharge, the Hi-Bay employees elected Kirby to replace Carr on Farr's Employee Involvement Committee. To the meetings, also attended by representatives of management, Kirby wore his hat with the IUE sticker. (7:1183, 1189–1190.)

On Friday December 9 Kirby apparently left a steam cleaner out overnight. A frozen unit could have done $3000 worth of damage. Bowman wrote a memo (R. Exh. 60), dated December 12, to Pickney and, he testified, told Kirby of the possible damage and cautioned him not to leave such equipment outside overnight. (10:2039–2043.) Asserting that no damage was done, Kirby denies that Bowman ever talked to him about it (12:2516).

Kirby admits receiving a verbal warning from Bowman for leaving a water hose out overnight (7:1178–1179). According to Bowman, who relied on information from Marvin Gardner and Day Supervisor Tinch, water in the hose froze and a new garden hose had to be purchased. Bowman wrote a December 16 report (R. Exh. 61) to Pickney about the matter. (10:2043–2046; 11:2207–2208.)

Kirby does not dispute that on December 22 he received a verbal warning (R. Exh. 62, dated December 21) for leaving a metal air reservoir out overnight. He had spray cleaned it and rust developed. According to Kirby, it took him about 5 minutes to remove the rust with a grinder and brush (12:2517–2519). Bowman recalls that Kirby required about 2.5 hours to grind off the rust (10:2046–2047). Bringing in Kirby's labor card in the surrebuttal stage, Pickney explains that on December 20 Kirby devoted at least 1.7 hours, and perhaps more, to removing the rust (12:2601–2604).

A new wrinkle with this December 22 ''verbal'' is that Kirby signed it. Bowman testified that he adopted this practice after learning that Carr, at Carr's December 16 Arkansas ESD hearing, had denied receiving a verbal warning. According to Bowman, he learned from reading the ESD transcript when it came to Pickney. (10:2048–2049; 11:2136–2139.) The problem with that is the time frame. The parties stipulated that the Arkansas ESD furnishes only tapes, which have to be transcribed, and that the transcription (R. Exh. 71) was typed in the office of Farr's attorneys in preparation for this hearing (10:2049). The stipulation does not include the date. However, given the time lag inherent in such a process, it is highly unlikely that the 72-page transcription was completed (or even begun) in December.

Nevertheless, the ESD transcript contains a denial by Bruce Carr that he received an oral or verbal warning from Bowman in August. (R. Exh. 71 at 23–24.) What happened, I find, is that Pickney simply reported the denial to Bowman after the December 16 ESD hearing, and Bowman then adopted his new practice. Bowman may well have read the ESD transcript when it arrived but, I find, no such transcript existed on December 22, 1988.

Bowman's last verbal warning to Kirby, dated January 16, 1989, is for forgetting to leave the electric fork truck plugged in overnight and for failing to bring in a large fork truck the night of January 13. (R. Exh. 63; 10:2051–2053.) Bowman has no personal knowledge whether any delay was caused by this the next morning. (The question of any delay may be irrelevant.) (11:2209.) Kirby testified that it ran the next day without recharging (although he presumably was not there the next day until he reported for the second shift), but he concedes it was his duty to plug in the electric fork lift before leaving that night. Similarly, he contends that he did not leave the large fork truck outside, but he concedes it was his duty to bring it in (7:1196–1201).

After his transfer to the filter line Kirby apparently fared well enough until July 1989. Pickney identified (8:1477) a July 25 ''verbal'' warning (R. Exh. 84), signed by Supervisor Larry Smith, reporting that on July 25 Kirby was given a ''verbal warning'' for ''carelessness'' on July 24 and 25 in not correctly labeling cartons and for stamping the wrong part number on carton labels. The exhibit was received over the General Counsel's continuing objection (8:1477–1478). Supervisor Larry Smith did not discuss this in his testimony. All these exhibits were received on the limited basis of what Farr considered in reaching a decision, and they specifically were not received for the truth of their contents. For evidence of truth, I told the parties to prove that by a witness (with personal knowledge). (8:1456–1459.)

For reported carelessness in work quality, Farr discharged Bobby Kirby effective July 28, 1989. (G.C. Exh. 27; R. Exh. 87; 7:1173–1175; 8:1474.) As mentioned earlier, the General Counsel does not attack the July 28, 1989 third written warning or the discharge as based on that warning. Farr's internal termination report (R. Exh. 87) is dated July 31. The ''Warning Decision'' portion of the third written warning reads (G.C. Exh. 27):

> In accordance with our progressive disciplinary policy this is your third warning within a 12 month period and is cause for termination, effective 7-28-89.

f. *Analysis and conclusions*

(1) The August 30–31, 1988 allegations

Return with me now to the August 30 rumor meeting in Personnel Manager Pickney's office. Recall that Pickney and Moring testified that they felt the meeting was constructive and had concluded with Kirby's departing satisfied. In Pickney's opinion, nothing was said suggesting that Farr would discharge Kirby even though Pickney told Kirby he had been exhibiting a very poor attitude toward management and that his attitude toward management had to change (8:1450–1451; 9:1665). On cross-examination, Moring also asserts that nothing was said that if Kirby's attitude did not improve his employment at Farr would end (9:1812).

Yet the very next day, as we now know, Kirby received a written warning for the challenge he uttered on returning to Hi-Bay. The first sentence in the ''Company Statement'' portion of the document declares (G.C. Exh. 8; R. Exh. 51) (emphasis added):

> A meeting was held between Bobby Kirby, Glen Moring, and Darrell Pickney, *where Bobby was told that he was exhibiting a very poor attitude and it must improve in order to continue his employment at Farr Company.*

Thus, Farr's own document establishes, by admission, that Kirby must improve his attitude or be terminated. We also know that Kirby, even if he was able to maintain his composure in the face of the threat while in Pickney's office, exploded in anger on his return to Hi-Bay. Clearly Pickney provoked Kirby. The question is, precisely what provoked Kirby.

Was the provocation linked to a question/statement to Kirby about IUE stickers and promotions? That is, were Pickney's remarks that Kirby's attitude must improve, rather than being directed against Kirby spreading rumors and telling other employees that the bidding system was a farce, in fact a threat to discharge Kirby if he continued wearing an IUE sticker? Actually, that threat is not alleged. The alleged threat is that employees with attitude problems would not be promoted. But ascertaining the correct threat assists in determining whether the alleged threat was made and whether Kirby's angry reaction minutes later in Hi-Bay is excused by the law and the August 31 written warning illegal because Kirby's reaction was provoked by any unlawful comments by Pickney.

Kirby testified that when Pickney asked why he was wearing ''IUE'' on his hard hat, Kirby gave his ''messed around with'' answer respecting his earlier bid on a maintenance job and for which he received no response. Kirby's uncontradicted testimony on cross examination is that 2 days later, apparently in their September 1 Hi-Bay office meeting, Pickney gave Kirby the name of the senior person selected for the maintenance position (6:1106–1107). That Pickney did so *supports* Kirby's position that the ''messed around with'' on his maintenance bid response indeed was mentioned in the August 30 rumor meeting. The critical question is, assuming that the maintenance bid was mentioned, did it come, as Kirby described, in response to a question by Pickney as to why Kirby was wearing an IUE sticker on his hard hat, or in response to a question by Pickney concerning why he did not trust management?

One problem here is that as neither Pickney nor Moring includes the maintenance bid topic in his version, neither offers a context for Kirby's ''messed with'' statement. Although it is not for me to supply the context, a possible context exists in Pickney's testimony that he told Kirby they needed to trust each other (8:1450) and Moring's testimony that Kirby was told he should have faith that management would follow the bidding procedure (9:1770). Easily a question could have been asked of Kirby, ''Why don't you trust (or have faith in) management?'' Kirby's ''messed with'' reply would fit neatly. Although neither Pickney nor Moring testified that it happened that way, I am not precluded from inferring and finding that it did and that Pickney, in so asking, said nothing about Kirby's IUE sticker.

Before resolving the matter, some credibility points should be covered. If, as Kirby asserts, Pickney asked about Kirby's IUE sticker and impliedly suggested that anyone wearing an IUE sticker would not get promoted, why did not Kirby thereafter raise this specific item at the several opportunities presented? The first opportunity was in Kirby's Hi-Bay outburst. His angry statement there to Bowman was limited to

possible discharge. Granted, discharge is more serious than a threat of no promotion. Nevertheless, it was the first opportunity. Second, when Kirby had to face Moring moments later in the Hi-Bay office, Kirby offered little defense, and said nothing about being angered by Pickney's reference to Kirby's IUE sticker. Third, at the written warning meeting the next day, August 31, Kirby had Moring modify the company statement portion on a minor point, but Kirby said nothing about any glaring omission of a reference by Pickney to his IUE sticker.

Finally, on September 1 when Pickney met with Pickney in the Hi-Bay office, a natural opportunity was presented. Pickney relayed the bad news of rejection of Kirby's bid for the painter's position. Kirby expressed his belief that he did not get the painter's position because of his IUE sticker. But Kirby failed to assert that this is proved by Pickney's reference on August 30 to Kirby's IUE sticker and Pickney's impliedly suggesting there would be no promotion for anyone wearing an IUE sticker.

Of course, Kirby is not a labor lawyer and cannot be expected to marshall and present his arguments as if he were not under the pressure of personal involvement. Still, it would seem to be natural enough that he would have reminded Pickney or Moring, if not Bowman, on at least one of the occasions—particularly when he was alert enough to ask on August 31 that the warning be amended (plus inserting by his own hand that Copeland was present) and on September 1 when he voiced his opinion that the reason he was not being promoted was his IUE sticker. Kirby does not say why he did not remind Pickney or Moring of Pickney's IUE remarks on August 30. Finally, as Kirby was 19 when he applied in February 1988 for employment at Farr (R. Exh. 44), I shall not disregard his youthful age as I weigh his reactions, presence of mind in the face of managerial interrogation, and questions he asked or did not ask.

Although doubt is raised concerning Kirby's story because he failed to mention Pickney's comments at subsequent opportunities, Kirby's version not only is more internally consistent than the Pickney-Moring version, but it also conforms more to the external facts. In short, Kirby's is more plausible. I am persuaded by Bobby Kirby's version rather than by the pock-marked version of Pickney and Moring. Neither Pickney nor Moring testified with a favorable demeanor in this area. Based on this resolution, I find that Kirby's angry reaction in Hi-Bay, moments after the August 30 rumor meeting in Pickney's office, was provoked by Personnel Manager Darrell Pickney's coercive interrogation (why wearing an IUE sticker),[49] his unlawfully equating the wearing of an IUE sticker with having a poor attitude,[50] then illegally implying that anyone with such an attitude would not get promoted at Farr,[51] and by then compounding that unlawful conduct with the further implied threat of discharge. Oddly, the implied threat is not alleged as violative of the Act. Kirby, I find, could reasonably interpret Pickney's remarks as suggesting he would be targeted for discharge because of his IUE sticker.

The quality of Kirby's work was not a topic in the rumor meeting. Yet Pickney saw fit to stress that Kirby, on returning to work, should ''do a good job.'' In the overall context, that admonition is merely a veiled threat that Farr would now be looking for pretexts to warn Kirby as a prelude to discharging him because of his open support of the IUE. Finally, Pickney and Moring, as reflected in the written warning, told Kirby that his *attitude* (read support of the IUE) had to improve (that is, cease supporting the IUE) in order for his employment to continue at Farr. Kirby, I find, could reasonably interpret Pickney's remarks as suggesting he not only would not be promoted if he persisted in supporting the IUE, but he also would be targeted for discharge, all because of his IUE sticker.

Going beyond a mere isolated question or comment, Pickney's remarks came in a series. I find they were planned and calculated to coerce Kirby. That Pickney in later meetings chose to be more circumspect, although a credibility consideration, has no bearing on the unlawfulness of the August 30 episode. The General Counsel argues that because Farr unlawfully provoked Kirby into his angry reaction the August 31 written warning is unlawful, must be expunged, and cannot be relied on as a basis for discharging Kirby on July 28, 1989 (Br. 59–60, 62). *Tubari Ltd*., 287 NLRB 1273, 1285 (1988); *Vought Corp*., 273 NLRB 1290, 1295 fn. 31 (1984), enfd. 788 F.2d 1378 (8th Cir. 1986). Agreeing with the General Counsel, I find that, as alleged in complaint paragraph 12(b)(1), Respondent Farr violated Section 8(a)(3) and (1) of the Act when it issued Bobby Kirby the August 31, 1988 first written warning. In a moment I shall discuss the impact of this violation in relation to Kirby's discharge.

(2) The September 1, 1988 failure to promote Bobby R. Kirby

The comments of Personnel Manager Pickney at the August 30 rumor meeting have a direct bearing on resolving credibility respecting the failure-to-promote allegation. It is clear, and I find, that Pickney's comments reflect Farr's animus against Kirby for openly supporting the IUE, a determination that no one wearing an IUE sticker would be promoted, and an implied threat that Kirby would be fired for wearing the IUE sticker. All of this occurred late in the day on August 30—well after Reynolds had made his report on the painting test results.

If Reynolds, in reporting the results that morning, had told Pickney that Kirby (and Heindselman) had failed, Pickney—even if he would have delayed beyond that day in telling Kirby—would have had less reason to say anything to Kirby about his IUE sticker and promotion. But I have found that Pickney did so speak. A reason he did so, I find, is that Reynolds reported that Kirby had passed the test. If something were not done, Kirby would be awarded the vacant position for painter. Saying nothing to Kirby about the test, Pickney, after Reynolds' report, called the employment service. Not until Farr had Richard Barton in place, and assured that Barton could do the job, did Pickney, on September 1, inform Kirby that (1) he had been rejected and (2) that Barton had been hired.

Finding that Kirby did pass the painting test and that Farr denied Kirby promotion to the painter's job because of his open support of the IUE, I find that Farr violated Section 8(a)(3) and (1) of the Act, as alleged in complaint paragraph 12(b)(2).

[49] Complaint par. 10(b)(1).

[50] Compliant par. 10(b)(2).

[51] Complaint par. 10(b)(3).

(3) Farr's *Wright Line* defense

Earlier I summarized the additional incidents between Kirby's September 12, 1988 second warning and his July 1989 discharge. (The September 7 incident was referred to in this second warning, and the September 10 caution against speeding was, I find, nothing more than a caution.) The September 14 cutting of a paint hose, even if it occurred as Bowman described, was resolved by Moring—''accidents do happen.'' Bowman never bothered to give Kirby the ''verbal'' mentioned by Bowman.

The December incidents, I find, were merely cautions to Kirby until the verbal warning of December 21. I credit Farr's evidence on the extent of grinding necessary to remove the rust. That brings up Bowman's testimony that the series of Kirby's carelessness left Bowman with the thought he would have to give Kirby a written warning if he did not ''straighten up real fast.'' (10:2049.) Knowing Kirby already had received his final written warning, Bowman testified he knew that ''if I gave him a written warning that it would mean termination.'' (10:2050.) Answering a hypothetical question over the General Counsel's objection, Bowman testified that, if there had been only one written warning outstanding (no final warning), he would have issued a written warning for this series of carelessness. ''In fact, I tried at one time and was overruled.'' (10:2051.) Pickney offers generalized support referring mostly to Bowman's intentions, concluding with the statement that had Kirby not (already) been at final Pickney ''quite possibly would have stepped in'' and asked Bowman how many chances he was going to give Kirby. (8:1479–1482.)

Although the hypothetical question to Bowman lumped the December incidents together, I interpret Bowman's testimony to mean his December 21 verbal (R. Exh. 62) would have been a written warning had it not been for the fact Kirby, already under the weight of a second/final warning, would have been terminated. Although Bowman did not similarly address the January 16, 1989 verbal (R. Exh. 63), Pickney included it in his list of items for which he would have recommended a final warning. (8:1479–1481.) Pickney's list (8:1479) includes every one of the memos Bowman identified, including even the caution about speeding (R. Exh. 54) as well as the second/final written warning itself (R. Exh. 55). Such grasping testimony is a farce. I do not believe a word of his testimony in this area. In any event it is legally irrelevant because he did not testify that he considered the option at that time rather than now. Consideration made at the unfair labor practice (ULP) trial comes too late. Every respondent employer would appreciate the option of offering up additional or different grounds after a complaint has issued contesting the grounds relied on. To that extent, I now sustain the General Counsel's objection to Farr's ''constructive issuance'' (after-the-complaint) defense.

Bowman's testimony is different. He says he considered the option *in December 1988*. That testimony is relevant under Farr's *Wright Line* burden. There is some evidence that on two earlier occasions Farr issued written warnings to employees for carelessness. Farr's list of disciplinary actions (R. Exh. 2) reflects that the first was to Jimmy Andrews on March 4, 1988, and the second to Dewayne Jacks on April 12, 1988. No details are in the record other than that Andrews was not a welder (9:1629). Respondent offered the list on the issue of disparate treatment (8:1339). Receiving the list over the General Counsel's objections, I suggested that the weight to be given such a summary could be slight (8:1338–1349). In the absence of details and documents concerning the warnings to Andrews and Jacks, and the extent of any damage from the asserted carelessness, I attach little weight to the listing of their warnings.

As Bowman observes, he wanted to fire Kirby over the September 14 paint hose incident (R. Exh. 78) but was overruled by Moring. Kirby having, in December, already received a second/final written warning, it is logical that Bowman would not have gone back to Moring for a discharge warning on anything less than a matter of substantial importance. But if there had been no outstanding second/final warning, so that a carelessness warning would have constituted only the second/final written warning, then it stands to reason that Bowman very well could have issued a second/final written warning on December 21. Although the only loss to Farr respecting the rust on the reservoirs was some lost time and expense, a habit of carelessness is potentially a serious problem.

The question here is whether Farr carried its burden to persuade by a preponderance of the evidence. Farr's evidence falls short, I find. The earlier warnings to Andrews and Jacks are of no real value because we have no details. Their carelessness possibly resulted in costly damage. If so, the precedential value here would be little. If damage was slight, or only potential, then the weight to be accorded such warnings would be much greater. In the absence of that precedent, the bare circumstances here do not meet the preponderance test.

The July 25, 1989 ''verbal'' (R. Exh. 84) from Larry Smith to Kirby stands unproved as to the truth of the asserted facts. Moreover, Larry Smith did not testify that he would have issued a written warning rather than a verbal had there been only one outstanding written warning. Pickney's inclusion of the July 25 verbal as one of those for which a written warning would have issued (8:1479, 1481) is, as I have discussed, neither credible nor legally relevant.

I therefore find that Farr failed to carry its burden under *Wright Line* to show that it would have issued a written warning to Bobby Kirby for one of the ''verbals'' had there been only one outstanding written warning before July 28, 1989.

(4) The remedy

The General Counsel seeks expunction of the August 31, 1988 first written warning, reinstatement, Kirby's promotion to painter, and backpay (Br. 62, notice). I shall so order. Once the tainted August 31 first written warning is deleted, the September 12 written warning becomes the first and the July 28 written warning becomes the second/final under Farr's progressive disciplinary system. Reinstatement and backpay are in order. As for the promotion to painter, determination of what effect, if any, the January–February 1989 layoff would have had on Kirby may be ascertained at the compliance stage.

CONCLUSIONS OF LAW

1. Farr Company is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The IUE is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent Farr violated Section 8(a)(1) of the Act by coercive interrogation of and statements to employees between June 1988 and May 1989 and issuing and maintaining an employee handbook containing an unlawfully broad no solicitation rule.

4. Respondent Farr violated Section 8(a)(3) and (1) of the Act by:

(a) Failing to promote Bruce E. Carr to ''A'' class welder effective June 27, 1988.

(b) Issuing a first written warning to Bobby R. Kirby on August 31, 1988.

(c) Failing to promote Bobby R. Kirby to painter on September 1, 1988.

5. Respondent Farr did not otherwise violate Section 8(a)(1) or (3) as alleged.

6. The unfair labor practices found affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent Farr unlawfully failed to promote Bruce E. Carr to ''A'' class welder effective June 27, 1988. Normally, the remedy would be retroactive promotion plus backpay. However, I am dismissing the complaint allegation that Farr unlawfully discharged Carr on October 11, 1988. The appropriate remedy, therefore, is backpay from June 27 to October 11, 1988, plus interest.

Farr must remove from its records the August 31, 1988 first written warning which it illegally issued to Bobby R. Kirby. As the revocation of that August 31 warning removes one of the necessary (under Farr's progressive disciplinary system) supports for Kirby's July 28, 1989 discharge, Farr must offer reinstatement to Bobby R. Kirby. Farr also discriminatorily failed to promote Kirby to the position of painter effective September 1, 1988. As Farr must reinstate Kirby, it must offer Kirby reinstatement to the painter's position retroactive to September 1, 1988, and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Although Farr notified its employees, by memo dated September 8, 1987 (R. Exh. 4), of amended rule 41, the continued presence of old rule 41, plus occasional failure to inform new employees of the amendment, requires that Farr notify its employees in writing, by memorandum or letter separate from the notice to employees, that the no-solicitation rule appearing as rule 41 on page 20 of the employee handbook has not been in effect since September 8, 1987. Farr must provide all current employees with a written insert for page 20 of the employee handbook, with the insert advising the reader that rule 41, as written, has been rescinded, or include a new and lawfully worded rule 41 on adhesive backing which will cover the old and unlawfully broad rule 41. Thereafter, any copies of the employee handbook printed with the unlawfully broad rule 41 must include the new insert before issuance to new employees. As an option, Farr may issue a revised handbook which does not contain an unlawfully broad no solicitation rule. *Brunswick Corp*., 282 NLRB 794, 795 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[52]

ORDER

The Respondent, Farr Company, Jonesboro, Arkansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating any employee about union support or union activities.

(b) Threatening employees that an employee was not promoted because of his union activities.

(c) Threatening employees with unspecified reprisals if they wear union insignia.

(d) Threatening employees because of their union activities by threatening to call the police and to have the employees' cars towed.

(e) Threatening employees by telling them that wearing an IUE insignia suggests that the employees have an attitude problem.

(f) Threatening employees by telling them that wearing an IUE sticker suggests that the employees have an attitude problem and then implying that employees with such an attitude problem will not be promoted.

(g) Threatening employees with plant closure if they select the IUE (or any labor organization) as their collective-bargaining representative.

(h) Maintaining any rule, or retaining one in an employee handbook even if the rule is no longer in effect, which requires employees to request management authorization to engage in lawful solicitation during nonworking time.

(i) Discharging or otherwise discriminating against any employee for supporting International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO or any other union.

(j) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Notify its employees in writing, by memorandum or letter separate from the notice to employees, that the no-solicitation rule, rule 41, appearing at page 20 of the employee handbook has not been in effect as written since it was amended September 8, 1987.

(b) Furnish all current employees with inserts for the employee handbook which (1) advise that rule 41 at page 20 of the handbook was amended on September 8, 1987; (2) provide the language of a lawful rule; or (3) simply substitute a valid rule for the one which now appears there as rule 41; or (4) publish and distribute revised handbooks which do not contain an invalid no-solicitation rule.

(c) Revise its records to show Bruce E. Carr promoted to the position of ''A'' class welder effective June 27, 1988,

[52] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

and make whole Bruce E. Carr for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(d) Revise its records to show Bobby R. Kirby promoted to the position of painter effective September 1, 1988, and offer Bobby R. Kirby immediate and full reinstatement to the position of painter or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(e) Remove from its files any reference to the unlawful (1) failure to promote Bruce E. Carr effective June 27, 1988; (2) August 31, 1988 first written warning to Bobby R. Kirby; and (3) failure to promote Bobby R. Kirby effective September 1, 1988, and notify each in writing that this has been done and that the unlawful actions will not be used against them in any way.

(f) Preserve and, on request, make available to the Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Post at its facility in Jonesboro, Arkansas, copies of the attached notice marked ''Appendix.''[53] Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found, including complaint paragraphs 9(a), (b), (c), and (d), 11 as to leadman, 12(a) and (c).

[53] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''